Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DIAMOND SHAMROCK REFINING
AND MARKETING COMPANY,
Petitioner,

v.

NUECES COUNTY APPRAISAL DISTRICT AND
THE APPRAISAL REVIEW BOARD OF THE
NUECES COUNTY APPRAISAL DISTRICT,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Import-Export Clause permits ports of entry into the United States (and related tax jurisdictions) to impose ad valorem property taxes upon goods in transit through them?

2. Whether the Commerce Clause permits ports of entry into the United States (and related tax jurisdictions) to impose ad valorem property taxes upon goods in transit through them?

PARTIES TO THE PROCEEDINGS

Pursuant to this Court's Rule 29.1, following are the parent company, subsidiaries (except wholly-owned subsidiaries), and affiliates of petitioner: Diamond Shamrock Refining and Marketing Co. is a wholly-owned subsidiary of Diamond Shamrock, Inc. Big Diamond, Inc.; Colonnade Assurance, Ltd.; Corporate Claims Management, Inc.; Engineering Technology, Inc.; Phoebus Energy, Ltd.; Shamrock Ventures, Ltd.; Sigmor Beverage, Inc.; and Skelly-Bellvieu Pipeline Co., L.L.C. are subsidiaries or affiliates of Diamond Shamrock Refining and Marketing Co.

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PETITION FOR A WRIT OF CERTIORARI

Diamond Shamrock Refining and Marketing Company ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Texas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Texas (App. 1a) is reported at 876 S.W.2d 298. The opinion of the Court of Appeals for the Thirteenth Judicial District, Corpus Christi, Texas (App. 14a) is reported at 853 S.W.2d 212. The judgment and the findings of fact and conclusions of law of the 117th District Court of Nueces County, Texas are unreported. (App. 42a, 52a).

JURISDICTION

The Texas Supreme Court entered its judgment on April 20, 1994. Petitioner's motion for rehearing was overruled on June 15, 1994. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 8 of the United States Constitution provides in pertinent part as follows:

> The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

Article I, § 10, cl.2 of the United States Constitution provides as follows:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

STATEMENT

This case presents an important and recurring question concerning goods imported into this country: whether ports of entry into the United States may impose ad valorem personal property taxes on goods in transit through them.

Petitioner Diamond Shamrock imports crude oil from the North Sea and the West Coast of Africa through the port of Corpus Christi, which is located in Nueces County, Texas.[1] (App. 43a,

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[1] For the sake of convenience, the terms "petitioner" and "Diamond Shamrock" are used herein to refer to Diamond Shamrock Refining and Marketing Company, its subsidiaries, and affiliates. Similarly, "port of

65a). The oil is transported by tanker to the Gulf of Mexico and then transferred into a storage facility on Harbor Island operated by American Petrofina, a common carrier. (App. 43a, 57a-58a). From Harbor Island, the oil is pumped through pipelines owned by American Petrofina and by petitioner to Three Rivers, Texas where petitioner operates a refinery. (App. 43a, 58a).

Normally, a portion of the oil imported by petitioner is delayed on Harbor Island and stored there in tanks owned by American Petrofina. (App. 43a, 58a). Such delays are typical in the oil industry. The tankers used to import crude oil into this country have massive cargo holds, on the order of magnitude of one or two million barrels. Pipelines such as American Petrofina's simply do not have the capacity to transport such volumes of oil all at once. As a consequence, unlike domestic crude oil, which is transported to the refinery as it is pumped out of the ground, imported crude oil must be stored temporarily at its port of entry until it can be pumped to the refinery. In petitioner's case, this process may take anywhere from one to four weeks. (App. 58a).

Under Texas law, various city, county and other political subdivisions are authorized to assess personal property taxes. *See, e.g.*, Tex. Const. art. VIII, § 1 (authorizing most political subdivisions of the state to assess personal property taxes).[2]

Corpus Christi" is used to refer to ports in Corpus Christi Bay.

[2] The definition in the Texas Property Tax Code of "taxing unit" gives some indication of the number of political subdivisions the state of Texas authorizes to impose property taxes. Under the Texas Property Tax Code,

> "Taxing unit" means a county, an incorporated city or town (including a home-rule city), a school district, a special district or authority (including a junior college district, a hospital district, a district created by or pursuant to the Water Code, a mosquito control district, a fire prevention district, or a noxious weed control district), or any other political unit of this state, whether created by or pursuant to the constitution or a local, special, or general law, that is authorized to impose and is imposing ad valorem taxes on property

Although American Petrofina pays hundreds of thousands of dollars in taxes on its Harbor Island facility each year, in 1989 respondent Nueces County Appraisal District decided to include petitioner's oil temporarily stored there awaiting shipment at American Petrofina's Harbor Island facility in the Nueces County appraisal roll for the years 1988 and 1989. (App. 57a, 59a). The Appraisal District also included oil stored at Harbor Island in the appraisal roll for the year 1990. (App. 57a). The consequence was that the oil was taxed at the rate applicable to property located within the county for the entire year. Petitioner protested these decisions, and on July 19, 1989, and on August 31, 1990, respondent Appraisal Review Board of Nueces County rejected petitioner's protests. (App. 45a, 47a). Petitioner then filed the present action pursuant to state law in Nueces County district court.

The case was tried before a district court in Nueces County on stipulated facts. Among other things, the parties stipulated that while in Nueces County, the oil imported by petitioner was "in transit to" petitioner's refinery in Three Rivers and that its presence in Nueces County was "reasonably necessary for the accommodation of the transportation of the crude oil" to the refinery. (App. 58a). Finding that the oil in question was imported from abroad and that its destination was outside Nueces County, the trial judge concluded that the Import-Export Clause and the Commerce Clause prohibited the authorities within Nueces County from assessing property taxes on the oil because the oil was in transit. (App. 42a-44a, 65a).

Sitting en banc, the Corpus Christi Court of Appeals reversed in a 4-3 decision. The majority found that because the taxes in question did not discriminate against foreign commerce on their face and that because the oil's destination was within the State of Texas, the taxes did not, and could not, offend any of the

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even if the governing body of another political unit determines the tax rate for the unit or otherwise governs its affairs.

Tex. Tax Code Ann. § 1.04(12) (West Supp. 1994).

purposes of the Import-Export Clause identified by this Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). (App. 16a-20a). The majority also declared that it was irrelevant whether the goods were in transit through Nueces County at the time they were appraised. Although the majority recognized that the fact that oil was in transit at the time of appraisal would have been relevant under traditional Import-Export Clause analysis, in its estimation, after *Michelin* "the concept of 'in transit' loses any rational meaning" independent of the purposes of the Clause. Accordingly, the majority asserted that once those purposes are satisfied, "the taxability of the property becomes a matter for the state." (App. 20a). For similar reasons, the majority rejected petitioner's Commerce Clause Challenge. One judge concurred separately.

Three judges dissented. The dissent found no basis for restricting the application of the in-transit rule of the Import-Export Clause and the Commerce Clause to goods that have not yet reached their state of destination. In focusing on whether goods are in transit, they observed, this Court's concern has not been where goods come to rest but rather whether they are in the midst of a commercial journey that originated outside the state in which they were taxed. (App. 28a). Similarly, in the dissent's view, far from abandoning its traditional concern with whether goods are in transit at the time personal property taxes are assessed, the Court expressly reaffirmed the importance of this fact in *Michelin*. (App. 27a-29a).

Finally, the dissent concluded that the taxes assessed upon petitioner were both discriminatory and unfairly burdensome. It observed that "[t]he 'operating incident' of the tax herein is the mere presence of the oil in the taxing jurisdiction: the oil's transit through Nueces County." (App. 40a). Under such circumstances, the taxes levied upon petitioner's oil were not a "*quid pro quo* for direct benefits conferred" upon petitioner but rather an extra charge for services for which the thousands of dollars in taxes paid by American Petrofina had already fully compensated the county. (App. 34a-35a).

On review the Texas Supreme Court affirmed. That court held that the Import-Export Clause was not violated by the taxes imposed upon petitioner's oil. It did so even though it acknowledged that the oil was "'in transit' while in Nueces County."[3] (App. 6a). The Texas Supreme Court also acknowledged that in *Michelin* this Court stated that the Import-Export Clause prohibits "'the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed.'" (App. 5a (quoting *Michelin*, 423 U.S. at 290)). Nevertheless, the State Court upheld the taxes assessed by Nueces County on the ground that the in-transit exception announced in *Michelin* did not apply to goods that enter the country through their state of destination.

The Texas Supreme Court purported to reach this conclusion on the basis of its reading of the purposes of the Import-Export Clause. According to the Texas court, one purpose of the Clause was to prevent states with ports of entry "'from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the inland States not situated as favorably geographically.'" (App. 4a (quoting *Michelin*, 423 U.S. at 285-86)). The taxes imposed upon petitioner did not, in the court's view, pose such a threat because "the oil in question here entered *only* the State of Texas and . . . never left Texas in its crude oil form." (App. 6a (emphasis in original)). Thus, according to the Texas court, when read in context, "the *Michelin* Court's qualification clearly applies only to goods in transit through the state *to or from another state* and not to goods merely in transit within the only state the goods ever enter." (App. 6a (emphasis in original)).

The Texas Supreme Court also rejected petitioner's Commerce Clause challenge, finding that petitioner's oil, though in transit

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[3] To the extent that the Court of Appeals suggested otherwise, the Texas Supreme Court found that "the Court of Appeals made an impermissible inference that conflicts with the facts as stipulated by the parties." (App. 6a n.2).

through Nueces County, had been delayed there for a significant period, and, therefore, had a sufficient nexus with the county to justify taxation under the Commerce Clause. (App. 10a-12a). The court noted many decisions of this Court invalidating state and local taxation of goods in transit, but attempted to distinguish them on the ground that they involved not "foreign goods 'in transit' through only one state, which remain in that state," but "goods 'in transit' through one State on the way to or from another State or on the way to a foreign country." (App. 9a-10a nn. 6-7 (citations omitted)). The Texas court also asserted that after this Court's decision in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988), "whether Diamond Shamrock's 'in transit' argument has any remaining validity under the modern Commerce Clause analysis is questionable." (App. 10a n.7).

REASONS FOR GRANTING THE WRIT

This case involves a question of importance under both the Import-Export Clause and the Commerce Clause: whether ports of entry into the United States are free to impose ad valorem personal property taxes on goods in transit through them.

More than five hundred billion dollars worth of goods are imported into this country each year.[4] By value, petroleum constitutes 10% of those goods, and the vast bulk of petroleum imported into this country is in the form of crude oil.[5] Nearly all of this oil is imported by tanker, and a small number of deepwater ports in Texas handle a third of this volume, roughly 800 million barrels a year, with Corpus Christi and Houston being the busiest ports of entry.[6] (Another third is imported

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[4] *See Statistical Abstract of the United States*: *1993* 808 (113th ed. 1993).

[5] *See id.* at 808, 818.

[6] *See* Energy Information Administration, *Petroleum Supply Annual 1992* 31 (May 1993) (noting that 2.2 billion barrels of oil were imported into the United States in 1992); *see also id.* at 44, 49 (noting that while approximately 1.44 billion barrels of oil were refined in Texas in 1992, only 650 million barrels of oil were produced in Texas in that year).

through ports in Louisiana.[7]) Most of this oil is in turn refined on the Texas Gulf Coast and distributed to consumers both inside and outside of Texas, from the Eastern Seaboard to the Rocky Mountains.[8] Typically, this oil, like many other imported goods, is off-loaded from ships at the port and stored there temporarily until it can be moved by pipeline or rail to the refinery. The decision below subjects this oil and other goods imported into Texas to ad valorem personal property taxation at the port of entry even though those goods are only in transit through the port. The effect of the decision is to authorize ports of entry to impose duties on oil and other goods in transit that will be passed on to citizens of other states consuming the goods in their finished form. The decision is contrary to the express language and purposes of the Import-Export Clause and in violation of the Foreign Commerce Clause.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF THE FIFTH CIRCUIT UNDER THE IMPORT-EXPORT CLAUSE.

A. The Decision Below Is Inconsistent With The Decisions Of This Court Under The Import-Export Clause.

The Import-Export Clause provides in pertinent part, "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection laws." U.S. Const. art. I, § 10, cl.2. Within its domain, this prohibition is absolute. There is no exception for goods imported into their state of destination, nor, as Justice Scalia noted last Term, can this prohibition be evaded by showing that a tax on imports is nondiscriminatory. *See Itel Containers Int'l. Corp. v. Huddleston*, 113 S.Ct. 1095, 1108 (1993) (Scalia, J., concurring in part and concurring in the

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[7] *See id.* at 31, 44, 49.

[8] *See id.* at 169, (noting that 1.5 billion barrels of oil were refined in Texas in 1992); Energy Information Administration, *State Energy Data Report* 299 (May 1992) (noting that 950 million barrels of oil were consumed in Texas in 1992).

judgment). When an import is taxed, the only issue is whether the tax qualifies as an impost or a duty under the Import-Export Clause. The decision below is contrary to the decisions of this Court ruling that the assessment of ad valorem personal property taxes upon imported goods in transit through their port of entry is a duty prohibited by the Import-Export Clause.

While the term "Imposts" is relatively narrow, covering only charges levied when and where a good enters the country, the term "Duties" is much broader. *See Michelin Tire Corp. v. Wages*, 423 U.S. 276, 291 (1976). As employed by the Framers of the Constitution, the term duties "apparently comprehended nearly all internal 'taxes.'"[9] The label that a state or local government chooses to attach to a given tax does not, however, determine whether it is a duty within the meaning of the Import-Export Clause. In applying the Clause, this Court has looked to the substance of the tax, not its form, in order to determine whether it is subject to the Clause's prohibition. *See, e.g., Michelin*, 423 U.S. at 289 n.9 ("'certainly it is the thing, and not the name, which is to be considered'") (quoting *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 314 (1852)). Thus, for many years, this Court interpreted the Import-Export Clause to prohibit any state or local tax that "'intercepts the import, *as an import*, in its way to become incorporated with the general mass of property.'"[10]

Plainly, an ad valorem personal property tax, when applied to imported goods in transit, is an import duty under this definition

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[9] 1 W. Crosskey, *Politics and the Constitution in the History of the United States* 296 (1953); *see also Michelin*, 423 U.S. at 290-91 (adopting Professor Crosskey's "persuasive demonstration" of what the Framers understood imposts and duties to be). In 1787, "probably only capitation, land and general property exactions were known by the term 'tax' rather than the term 'duty.'" *Michelin*, 423 U.S. at 291 (citing 1 W. Crosskey, *supra*, at 297).

[10] *Michelin*, 423 U.S. at 298 (quoting *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827) (Marshall, C.J.)); *accord Youngstown Sheet & Tube Co v. Bowers.*, 358 U.S. 534, 541 n.7 (1959).

and, more importantly, under such circumstances the tax is, on a substantive level, indistinguishable from an import duty. As the dissent in the Texas Court of Appeals noted, when property taxes are assessed upon imported goods in transit, the incidence of the tax is the same as that of an import duty: "the mere presence of the [goods] in the taxing jurisdiction." (App. 40a). This means not only that the property tax "intercepts" the imported goods before it reaches its destination, but also that the tax has exactly the same effect as an import duty. Ad valorem property taxes are always similar to import duties in that both are based upon a percentage of the value of the goods being taxed. Normally, the taxes are distinguished by their incidence: import duties are triggered by the entry of goods into the jurisdiction whereas property taxes apply only to goods present in a jurisdiction with some degree of permanence (*see, e.g.*, Tex. Tax Code Ann. § 21.02 (West Supp. 1994)). When, however, a property tax is applied to goods in transit, the incidence of the tax becomes the mere presence of those goods in the taxing jurisdiction, and any substantive distinction between property taxes and import duties collapses.

Recognizing this equivalence, for more than a century this Court held that imported goods were immune from all state and local taxation until they were either used, sold, or removed from their original packages. *See, e.g., Youngstown Sheet & Tube Co v. Bowers*, 358 U.S. 534, 541-42 (1959); *see Low v. Austin*, 80 U.S. (13 Wall.) 29, 33-34 (1870). Ultimately, the "original package" doctrine proved to be too broad, too arbitrary in its application and too tenuously based in the history and purposes of the Clause to survive. *See, e.g., Michelin*, 423 U.S. at 286-94; *see also id.* at 282-83 (noting that "[s]cholarly analysis had been uniformly critical of *Low v. Austin*."). Accordingly, in *Michelin*, this Court discarded the doctrine and held that "a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are no longer in import transit" is consistent with the Import-Export Clause. 423 U.S. at 286.

However, in so doing, this Court did not suggest that goods that are in transit may be subjected to local property taxes. To

the contrary, *Michelin* made clear that goods in transit remain immune from state and local property taxation. The decision expressly noted that such taxes may conflict with the Import-Export Clause's objective of preventing states with thriving ports of entry, such as Corpus Christi, from imposing "transit fees" on imported goods passing through those ports on their way to consumers in other states. *See* 423 U.S. at 290.[11] This Court also quoted with favor an opinion by Chief Justice Taney explaining that the assessment of property taxes violates the Import-Export Clause only when the goods in question are in transit.[12]

Subsequent decisions of this Court considering the in-transit rule have recognized the rule and distinguished it based on the specific facts before the Court. In *Department of Revenue v.*

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[11] Specifically, after observing that nondiscriminatory property taxes pose little threat of such fees when applied to goods that have completed their import journey, this Court found that

> to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed.

Michelin, 423 U.S. at 290.

[12] The quoted passage reads as follows:

> Undoubtedly, a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner. But *a tax of this description stands upon a very different footing from a tax on the thing imported, while it remains a part of foreign commerce and is not introduced into the general mass of property in the State.*

Michelin, 423 U.S. at 300-01 (quoting *License Cases*, 46 U.S. (5 How.) 504, 576 (1847) (opinion of Taney, C.J.)) (emphasis added).

Association of Washington Stevedoring Cos., 435 U.S. 734 (1978), this Court considered the application of a business and occupation tax to stevedoring services provided to imports and exports. Because the tax did not fall directly upon imported goods, this Court distinguished *Michelin* and the in-transit rule and, accordingly, did not "reach the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit." 435 U.S. at 757 n.23. Similarly, in *Itel Containers*, the Court considered a sales tax applied to the leasing of cargo containers used in international shipping. Once again, the Court found itself faced with a tax that did not fall directly upon the goods being imported. *See* 113 S.Ct. at 1106. There, however, the Court recognized the "prohibition on the direct taxation of imports and exports 'in transit'" and assumed that the "rule has not been altered by the approach we adopted in *Michelin*." *Id.* at 1106.

In view of the history of and policies underlying the Import-Export Clause, the *Michelin* rule serves important purposes. As this Court noted in *Michelin*,

> One of the major defects of the Articles of Confederation and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individuals States free to burden commerce both among themselves and with foreign countries very much as they pleased.

423 U.S. at 283. Unable to resist the temptation of exporting costs to other jurisdictions, "[s]tates having fine harbors imposed tax on all goods reaching the Continent through their ports." *Cook v. Pennsylvania*, 97 U.S. 566, 574 (1878). Not surprisingly, one of the evils the Import-Export Clause sought to prevent was the "levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to single out goods destined for other States." *Michelin*, 423 U.S. at 290. The in-transit rule recognized by this Court in *Michelin* prevents states from discriminating against

foreign commerce by prohibiting them from imposing taxes upon goods that are in transit through their ports.

The Texas Court of Appeals majority explicitly rejected the in-transit rule. Although the Texas Supreme Court was more circumspect, acknowledging the continued vitality of this rule, it interpreted the rule so narrowly as to prevent its application to goods that enter the country in the state where they will be processed into finished goods. No such limiting distinction can be found in *Michelin* or any of this Court's earlier decisions. Whether or not goods are first processed in their state of entry, the risk remains that port-of-entry taxes on raw materials will be exported to other states as part of the price for the finished goods. Moreover, just last term in *Associated Industries v. Lohman*, 114 S.Ct. 1815 (1994), this Court rejected a similar claim that regulation of commerce should be analyzed on a state rather than a county-by-county level, holding instead that such regulations are "appropriately assessed with reference to the specific subdivision" promulgating the regulations at issue. *Id.* at 1822.

The decision below also conflicts with the policies that led this Court to invoke the distinction between goods that are in transit and those that are not. State and local governments are often tempted to use their taxing power to impose *de facto* tariffs on goods passing through them and thereby pass along the cost of their operations to consumers outside their jurisdiction.[13] *See, e.g., West Lynn Creamery, Inc. v. Healey*, 114 S.Ct. 2205, 2211 (1994) ("the cases are filled with state laws that aspire to reap some of the benefits of tariffs by other means"). Normally, this tendency is held in check by the local interests that would be adversely affected by such taxes. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981) ("the existence of major in-state interests adversely affected by the Act is a powerful

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[13] Of course, consumers will not pay those costs if the relevant markets are sufficiently competitive. This economic truism does not, however, affect analysis under the Import-Export Clause. *See Michelin Tire Co.*, 423 U.S. at 288 n.8.

safeguard against legislative abuse"). When, however, imported goods are in transit, they are normally not owned by anyone within the jurisdiction, which means that there will frequently be no local interests adversely affected by -- and therefore willing to act as a "political check" upon -- taxation designed to discriminate against imported goods in transit.

Imported goods, while in transit, are also susceptible to subtle and often undetectable, forms of discrimination. A port of entry need not explicitly single out goods imported through the port in order to extract a fee from them for the use of the port. It might, for example, impose a special tax upon a particular category of property and define that category so that it encompasses goods imported through the port but little other property in the jurisdiction. Or, subtler still, the jurisdiction might choose to shift from sales, income or other taxes that do not affected goods in transit through the port to property taxes that do. In these and other ways, a port of entry may take advantage of transportation bottlenecks that delay goods imported through them to extract from those goods a disproportionate share of the cost of the jurisdiction's operations without imposing a tax that discriminates against imports on its face.

Of course, if courts could easily detect such discrimination, there would be no need for a rule banning the assessment of all property taxes upon imported goods in transit. Courts are, however, ill-equipped to detect covert discrimination against imported goods in transit. They are not competent to evaluate comparative tax burdens directly, *see, e.g., Associated Indus. v. Lohman*, 114 S.Ct. at 1825 n.5; *American Trucking Ass'n., Inc. v. Scheiner*, 483 U.S. 266, 189 (1987), and the proxy upon which they normally rely -- the fairness of the political process (*see, e.g., West Lynn Creamery v. Healey*, 114 S.Ct. at 2215) -- is rarely available when the goods taxed are in transit because, as discussed above, there will normally be no political check upon the tendency to discrimination against imported goods in transit. Under such circumstances, where discrimination is not only likely, but also likely to go undetected, the only judicially manageable solution is the one adopted by this Court in *Michelin*:

a bright-line rule barring the assessment of property taxes upon goods in transit.

The Texas Supreme Court's decision is plainly in conflict with this rule and, therefore, with *Michelin*. Even if subsequent decisions, such as *Itel* and *Washington Stevedoring* are viewed as reserving the "in-transit" question, that question remains important and should be resolved by this Court.

B. The Decision Below Conflicts With A Decision Of The Court Of Appeals For The Fifth Circuit Under The Import-Export Clause.

The decision below also conflicts with a recent decision of the Fifth Circuit Court of Appeals. In *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir.), *cert. denied*, 498 U.S. 897 (1990), the Pilot Petroleum Corporation contracted to sell jet fuel oil to buyers in Canada. Delivery was to occur at an oil tanker anchored in the port of Mobile, Alabama. In order to meet its obligations under the contract, Pilot Petroleum purchased the requisite fuel oil from the Louisiana Land & Petroleum Company, which delivered the oil to the tanker. When the state of Alabama attempted (using Louisiana Land as its agent) to levy a sales tax on Pilot Petroleum's sale to the Canadian buyers, Pilot Petroleum objected on the ground that the tax was barred by the Import-Export Clause. Finding that "the Alabama fuel tax in this case is a tax that is levied on the goods themselves while they are in transit," the Fifth Circuit concluded that the tax was prohibited by the Import-Export Clause. 900 F.2d at 821; *see also id.* (relying upon *Michelin*).

Although the Texas Supreme Court acknowledged the existence of the Fifth Circuit's decision in *Louisiana Land*, it did not attempt to distinguish the decision. It merely noted that "a tax on goods in transit into the foreign export stream of commerce may negatively impact" the policy of exclusive federal control of commercial relations with foreign nations underlying the Import-Export Clause and cited *Louisiana Land*. (App. 6a n.3). The Texas court offered no explanation as to why a tax on goods

in the foreign *import* stream would not similarly impact that policy. Not surprisingly, at least one lower court in Texas has failed to see one and, relying upon the opinion of the Texas Court of Appeals below, upheld the assessment of property taxes directly upon exports in transit to a foreign destination. *See Harris County Appraisal Dist. v. Virginia Indonesia Co.*, 871 S.W.2d 864, 868, 870-71 (Tex. Ct. App. 1994) (writ of error granted Sept. 8, 1994). Certiorari should be granted to resolve the conflict with *Louisiana Land*.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT UNDER THE COMMERCE CLAUSE.

The decision below also raises important and recurring questions under the Commerce Clause and conflicts with decisions of this Court under that clause. This Court has on numerous occasions prohibited the assessment of property taxes upon goods in transit. *See, e.g., Carson Petroleum v. Vial*, 279 U.S. 95 (1929) (invalidating property taxes assessed on oil destined for customers in England and France but stored temporarily at a port until sufficient oil to fill a tanker accumulated); *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469 (1926) (invalidating property taxes assessed on logs destined for a mill in Michigan but awaiting loading onto ships in Minnesota); *Champlain Realty Co. v. Town of Brattleboro*, 260 U.S. 366 (1922) (invalidating property taxes assessed on logs being floated from Vermont to New Hampshire but temporarily delayed by river conditions); *Kelley v. Rhoads*, 188 U.S. 1 (1902) (invalidating a grazing tax on sheep being driven across Wyoming to Nebraska); *see also Coe v. Errol*, 116 U.S. 517, 518-519, 528 (1886) (noting with favor that the New Hampshire Supreme Court invalidated a tax on logs being floated from New Hampshire to Maine but delayed by low water). Most of these cases involve taxes assessed by political subdivisions such as Nueces County rather than the states authorizing the taxes. Moreover, so far as petitioner is aware, this Court has never suggested that the political subdivisions of a state have any greater power to tax goods in transit under the

Commerce Clause than the states themselves do, and *Associated Industries*, of course, makes clear that they do not.

The Texas Supreme Court attempted to distinguish this Court's decisions applying the in-transit rule on their facts. It noted that the decisions cited by petitioner below "involve taxes on goods 'in transit' through one State on the way to or from another State or on the way to a foreign country." (App. 9a n.6 (citations omitted)). It failed, however, to note that this Court has on at least one occasion invalidated a tax on goods in transit in their state of final destination. *See Western Oil Refining Co. v. Lipscomb*, 244 U.S. 346 (1917). Furthermore, the same concerns over the potential for difficult-to-detect discrimination that prompted this Court to employ the in-transit rule under the Import-Export Clause apply under the Commerce Clause, where the rule was first formulated. *See supra* pp. 13-15.

Nor has this Court overruled its decisions under the Commerce Clause applying the in-transit rule. Although this Court did state in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988), that it is "largely irrelevant" for Commerce Clause purposes whether goods are "considered in the stream of interstate commerce" (*id.* at 31), in that case it neither considered a property tax nor analyzed the in-transit rule. More importantly, in *Michelin*, this Court explicitly recognized that in addition to violating the Import-Export Clause, the assessment of property taxes upon imported goods in transit "would also be invalid under traditional Commerce Clause analysis" (*id.* at 290 n.11), and commentators in this area have uniformly concluded that the in-transit rule survives. *See* P. Hartman, *Federal Limitations on State and Local Taxation* § 7:3, at 383 (1981) (noting that the in-transit rule has "been closely followed and thus far the Court has denied the competence of the States to tax articles in interstate transit"); I J. Hellerstein & W. Hellerstein, *State Taxation: Corporate Income and Franchise Taxes* ¶¶ 4.11, 5.06 (2d ed. 1993) (arguing that the assessment of property taxes on goods in transit violates the Commerce Clause). Certiorari should be granted to resolve the conflict between the decision below and this Court's in-transit Commerce Clause decisions.

III. THE DECISION BELOW RAISES AN IMPORTANT AND RECURRING ISSUE.

The issue raised by this case is not unusual. More than forty states either directly impose or authorize political subdivisions to impose personal property taxes.[14] Although several states specifically recognize that property taxes may not be imposed upon imported goods in transit and exempt those goods from assessment,[15] most do not, and others appear to have ignored the

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[14] Ala. Code § 40-11-1(b)(16) (1993); Alaska Stat. § 29.45.010 (1992); Ariz. Rev. Stat. Ann. § 2-202 (1991); Ark. Code Ann. § 26-3-201 (Michie 1992); Cal. Rev. & Tax. Code § 201 (West 1987); Colo. Rev. Stat. § 39-1-105 (1982 & Supp. 1993); Conn. Gen. Stat. § 12-71 (1993); D.C. Code Ann. § 47-1522(a) (1981 & Supp. 1994); Fla. Stat. Ann. § 196.001(1) (West 1989); Ga. Code Ann. § 48-5-3 (1991); Idaho Code § 63-101 (1989); Ind. Code Ann. § 6-1.1-2-1 (West 1989 & Supp. 1994); Kan. Stat. Ann. § 79-101 (1989); Ky. Rev. Stat. Ann. § 132.020(6) (Michie Supp. 1992); La. Rev. Stat. Ann. § 47:1951 (West 1990); Me. Rev. Stat. Ann. tit. 36, § 502 (West 1978); Md. Code Ann., Tax-Prop. § 101(a)(1) (1994); Mass. Gen. Laws Ann. ch. 59, § 2 (West 1988); Mich. Comp. Laws Ann. § 211.1 (West 1986); Minn. Stat. Ann. § 272.01(1) (West 1989 & Supp. 1994); Miss. Const. art. 4, § 112; Mo. Ann. Stat. § 137.075 (Vernon 1988); Mont. Code Ann. § 15-6-101(1) (1993); Neb. Rev. Stat. § 77-201 (1990); Nev. Rev. Stat. Ann. § 361.045 (Michie 1993); N.J. Stat. Ann. § 54:4-1 (West 1986 & Supp. 1994); N.M. Stat. Ann. §§ 7-35-2(I), 7-37-2 (Michie 1993 & Supp. 1994); N.C. Gen. Stat. § 105-274 (1993); N.D. Cent. Code § 57-02-03 (1993); Okla. Stat. Ann. tit. 68, § 2804 (West 1992); Or. Rev. Stat. § 307.030(1) (Supp. 1994); R.I. Gen. Laws § 44-3-1 (1988); S.C. Code Ann. § 12-37-210 (Law. Co-op 1976); S.D. Codified Laws Ann. § 10-4-1 (Supp. 1994); Tenn. Code Ann. § 67-5-101 (1989); Utah Code Ann. 59-2-901 (1963); Va. Code Ann. §§ 58.1-100, 58.1-3000 (Michie 1991); Wash. Rev. Code Ann. § 84.36.005 (West 1991); W. Va. Code § 11-5-1 (1991); Wis. Stat. Ann. § 70.01 (West 1989); Wyo. Stat. § 39-1-102 (1994).

[15] Ga. Code Ann. § 48-5-5 (1991); Ind. Code Ann. § 6-1.1-10-30 (West 1989); La. Rev. Stat. Ann. § 47:1951.1(2) (West 1990); Me. Rev. Stat. Ann. tit. 36, § 655(1)(G) (West 1978); Mass. Gen. Laws Ann. ch. 59, § 2; Miss. Code Ann. § 27-31-13 (1972); Wyo. Stat. § 39-1-

Constitution's ban against such taxes and exempted only a portion of the goods in transit through their states.[16] Directly or indirectly, resolution of the issue raised by the decision below -- whether state and local governments may assess personal property taxes upon goods in transit in foreign commerce -- affects all of these states.

This issue is of indisputable importance. The amount of foreign trade in this country is increasing each year, and raw materials such as oil are especially vulnerable to taxation at their ports of entry. The huge volumes in which such materials are imported create transportation bottlenecks at the few ports able to accommodate them, which in turn necessitate the temporary storage of those goods in those ports. As a consequence, ports of entry are often faced with the opportunity to tax, and therefore the temptation to discriminate against, imported goods that are merely in transit through them. The immediate effect of the decision below is to subject the billions of dollars of crude oil imported through Texas ports to such local assessments. If allowed to stand, this decision may also affect an even larger proportion of the goods imported into this country, as other ports, tempted by the potentially vast and politically painless revenues to be derived from imposing import duties on foreign commerce, follow Texas' lead.

201(a)(1994).

[16] Ariz. Rev. Stat. Ann. § 42-631 (1991); Ark. Code Ann. § 26-26-1102(b)(1) (Michie 1992); D.C. Code Ann. § 47-1508(4)(1981); Fla. Stat. Ann. § 192.032(4) (West 1989); Idaho Code § 63-105W (1989); Ind. Code Ann. § 6-1.1-10-29 (West 1989 & Supp. 1994); Kan. Stat. Ann. § 79-201f (1989); Mich. Comp. Laws Ann. § 211.9(*l*) (West 1986); Mo. Ann. Stat. § 137.910 (Vernon 1988); Mont. Code Ann. § 15-6-202 (1993); Nev. Rev. Stat. Ann. § 361.160 (Michie 1993); N.C. Gen. Stat. § 105-275(2) (1993 & Supp. 1993); Okla. Stat. Ann. tit. 68, § 2831(E) (West 1992); S.C. Code Ann. § 12-37-1110 (Law. Co-op. 1976); Tenn. Code Ann. § 67-5-217 (1989); Va. Code Ann. § 58.1-3514 (Michie 1991); Wash. Rev. Code Ann. §§ 84.36.140, 84.36.176, 84.36.181 (West 1991); W. Va. Code § 11-5-13(a) (1991).

Finally, it is especially important that the legal rules in this area be clear. As this Court recognized long ago, it is "highly important, both to the shipper and the State," that the point at which state and local governments may assess property taxes be "clearly defined so as to avoid all ambiguity or question." *Coe v. Errol*, 116 U.S. at 526. In order to plan effectively, businesses must be able to forecast with some accuracy their tax expenditures and state and local governments their revenues. Uncertainty over the ability of such governmental units to tax the goods flowing through them undermines the ability of both to do so. This case presents in a sharply defined manner the issue of whether ports of entry into this country may assess ad valorem property taxes upon goods in transit through them and is, therefore, an appropriate vehicle for resolving these important and recurring issues.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

DIAMOND SHAMROCK REFINING
AND MARKETING COMPANY,
Petitioner,

v.

NUECES COUNTY APPRAISAL DISTRICT

and the Appraisal Review Board

of the Nueces County Appraisal District,

Respondents.

No. D-3982

Supreme Court of Texas
Argued Jan. 19, 1994
Decided April 20, 1994

Edward Kliewer, III, Kenneth L. Malone. San Antonio, for petitioner

Russell R. Graham, Peter W. Low, Austin, for respondents.

PHILLIPS, Chief Justice, delivered the opinion of the Court in which all Justices join.

In this case we consider whether oil which is imported from abroad directly into Texas, which is its final destination, may be taxed while in transit within Texas under the Import-Export Clause and the Commerce Clause of the United States Constitution. We hold that it may, and we therefore affirm the judgment of the court of appeals. 853 S.W.2d 212.

Diamond Shamrock brought this action as a petition for review under the provisions of Chapter 42 of the Texas Property Tax Code challenging the determination by the Nueces County Appraisal District and the Nueces County Appraisal Review Board that certain crude oil owned by Diamond Shamrock was taxable for the years 1988, 1989 and 1990. The parties tried this case upon an agreed statement of facts pursuant to Tex.R.Civ.P 263.

The oil in question was shipped from foreign sources through the Gulf of Mexico, off-loaded at the Harbor Island storage facility in Nueces County, held there in tanks, and transmitted by pipeline to Diamond Shamrock's refinery in Three Rivers, Live Oak County, Texas. Some of Diamond Shamrock's crude oil was always present at Harbor Island between 1987 and 1990, although the particular oil in the tanks on January 1, 1988, 1989 and 1990 was actually present for a maximum period of 12 to 25.3 days. The government provides services to the Harbor Island facility in general and to Diamond Shamrock's crude oil in particular.

The parties stipulated that the grounds of Diamond Shamrock's complaint were as follows:

> Plaintiff [Diamond Shamrock] protested the inclusion of its property on such appraisal rolls to Defendant, the Appraisal Review Board, pursuant to Chapter 41 of the Texas Property Tax Code on the ground that such property was not subject to ad valorem taxation in Texas for tax years 1988, 1989 and 1990, because such taxation is precluded by the Commerce Clause and the Import/Export Clause of the United States Constitution. Plaintiff did not protest the situs in Texas at which the property is taxed, nor its market value, and neither is at issue in these cases.

The trial court decreed that the oil in question was exempt from taxation by Nueces County for the tax years in question, and it ordered that the property be deleted from the applicable appraisal rolls for those tax years. The court of appeals reversed, rendering judgment that Diamond Shamrock's oil in Nueces County is not exempt property under either the Commerce Clause or the Import-Export Clause of the United States Constitution.

In this Court, Diamond Shamrock contends that, under both the Import-Export Clause and the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 10, cl. 2 and § 8, cl. 3, the oil is not taxable in Nueces County because it is "in transit." To support this proposition, Diamond Shamrock cites, e.g., *R.J. Reynolds Tobacco Co. v. Durham County*, U.S. 130, 107 S.Ct. 499, 93 L.Ed.2d 449 (1986); *Department of Revenue v. Ass'n of*

Wash. Stevedoring Cos., 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976); *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir. 1990), *cert. denied*, 498 U.S. 897, 111 S.Ct. 248, 112 L.Ed.2d 207 (1990); *City of Farmers Branch v. Matsushita Elec. Corp.*, 537 S.W.2d 452 (Tex. 1976); and *Calvert v. Zanes-Ewalt Warehouse, Inc.*, 502 S.W.2d 689 (Tex. 1973), *appeal dism'd*, 416 U.S. 923, 94 S.Ct. 1921, 40 L.Ed.2d 279 (1974). The District counters that none of the evils prevented by application of the Import-Export Clause or the Commerce Clause are implicated by its taxation of Diamond Shamrock's oil, and that Diamond Shamrock should pay for the government services provided to its property.

Under these facts, we do not resolve a number of significant questions. For instance, we do not decide whether oil passing through Texas on its way to a foreign country or to another State is taxable under the Import-Export Clause or the Commerce Clause. Nor do we decide whether oil arriving in Texas from another State is taxable. Rather, the only question presented is whether oil that enters Texas from a foreign country and reaches its ultimate destination here may, under the United States Constitution, be taxed in a particular Texas county, despite the fact that it is still "in transit" while there.

I

The Import-Export Clause of the United States Constitution states:

> No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net product of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States: and all such laws shall be subject to revision and control of the Congress.

U.S. Const. art. I, § 10, cl. 2. The leading case interpreting this Clause is *Michelin Tire Corporation v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976), which overruled earlier cases to adopt a new analytical framework, thereby creating "a fundamentally different approach to cases claiming the protection of the Import-Export Clause." *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 359, 104 S.Ct. 1837, 1841, 80 L.Ed.2d 356 (1984)("*Hooven II*"). *See also Department of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 752, 98 S.Ct. 1388, 1400, 55 L.Ed.2d 682 (1978).

Michelin involved a challenge to a county ad valorem property tax on tires imported from France and Nova Scotia which were being held in a wholesale distribution warehouse. From there, the tires were distributed to franchised dealers in six southeastern states. *Michelin*, 423 U.S. at 278-80, 96 S.Ct. at 537-38. The Court upheld the tax, holding that it did not offend the three policies underlying the Import-Export Clause, to wit:

> [(1)] the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistent with that exclusive power; [(2)] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and [(3)] harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the inland States not situated as favorably geographically.

Id. at 285-86, 96 S.Ct. at 540-41.[1]

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[1] By these policies, the Framers sought to cure one of the "major defects" of the Articles of Confederation; namely "the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased." *Michelin*, 423 U.S. at 283, 96 S.Ct. at 539.

Because the tax was a nondiscriminatory property tax, the Court held that it did not violate either the "one voice" policy or the "federal revenue enhancement" policy. *Id.* at 286, 287, 96 S.Ct. at 541, 541. As to the "harmony between the States" policy, *Michelin* likewise held that "nondiscriminatory ad valorem property taxes do not interfere with the free flow of imported goods among the States." *Id.*, 423 U.S.at 288, 96 S.Ct. at 542. Although such taxes may increase the cost of goods purchased by "inland" consumers, such taxation is merely a quid pro quo for benefits actually conferred by the State. Thus, "[t]here is no reason why local taxpayers should subsidize the services used by the importer." *Id.* at 289, 96 S.Ct. at 542. The Clause was intended to prevent certain geographically situated States from being able to impose "exactions which were no more than transit fees on the privilege of moving through a State," and thus "[a] nondiscriminatory ad valorem property tax obviously stands on a different footing." *Id.* at 290, 96 S.Ct. at 543.

Michelin went on, however, to qualify its holding slightly for goods "merely in transit through the State," stating that "to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed." *Id.*, 423 U.S. at 290, 96 S.Ct. at 543.

The Supreme Court has since explained its new approach as follows:

> To repeat: we think it clear that this Court in Michelin specifically abandoned the concept that the Import-Export Clause constituted a broad prohibition against all forms of state taxation that fell on imports. Michelin changed the focus of Import-Export Clause cases from the nature of the goods as imports to the nature of the tax at issue. The new focus is not on whether the goods have lost their status as imports but is, instead, on whether the tax sought to be imposed is an "Impost or Duty."

Hooven II, 466 U.S. at 360, 104 S.Ct. at 1842. *See also Reynolds Tobacco*, 479 U.S. at 153, 107 S.Ct. at 513.

Pointing to the parties' stipulation that its crude oil is "in transit" while in Nueces County, Diamond Shamrock argues that the tax here falls within the "merely in transit" qualification. We disagree. The tax in question here does not in any way impinge on the third "harmony among the States" policy of the Import-Export Clause. Although still on its foreign import journey and in that sense "in transit,"[2] the oil in question here entered *only* the State of Texas and, according to the stipulated facts, never left Texas in its crude oil form. Thus, there simply was no opportunity for harmony between the states to be disturbed.[3] Read in context, the *Michelin* Court's qualification clearly applies only to goods in transit through the state *to or from another state* and not to goods merely in transit within the only state the goods ever enter. *See* Robert C.W. Frantz, Comment, *Constitutional Law--Nondiscriminatory Ad Valorem Tax May Be Applied To Imports*, 30 Rutgers L.Rev. 193, 197 (1976) (defining the "transit" discussed by the *Michelin* Court as "i.e., travelling through the importing state en route to another"). Under the

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[2] We agree with Diamond Shamrock that, in stating that the oil in question was not "in transit" because it was held in storage for a business purpose, as opposed to being held in storage merely to accommodate its transportation into the pipeline to Three Rivers, the court of appeals made an impermissible inference that conflicts with the facts as stipulated by the parties in this Agreed Case under Tex.R.Civ.P. 263. We do not agree, however, that the court's judgment was grounded on this fact. To the contrary, the court held that "the concept of 'in transit' loses any rational meaning" once the purposes of the Import-Export Claused have been satisfied. 853 S.W.2d at 216.

[3] Likewise, the "in transit" nature of the oil does not bring its taxation in Nueces County into conflict with the first two policy prongs of the Import-Export Clause, as identified in *Michelin*. Although a tax on goods in transit into the foreign export stream of commerce may negatively impact the "one voice" policy, *see Louisiana Land*, 900 F.2d at 821, it is clear under *Michelin* that a nondiscriminatory ad valorem tax on imported goods does not violate either of the first two policy prongs of the Clause, regardless of whether the goods are in transit or not.

Import-Export Clause, the oil is taxable in Texas. Where in Texas--Nueces County, Live Oak County or elsewhere--is not a subject governed by that Clause.

II

The Commerce Clause of the United States Constitution grants Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. Modern analysis of this Clause is governed by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288, 97 S.Ct. 1076, 1083, 51 L.Ed.2d 326 (1977), where the Court abandoned the abstract notion that interstate commerce "itself" cannot be taxed by the States. *See D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30, 108 S.Ct. 1619, 1623, 100 L.Ed.2d 21 (1988). In *Complete Auto*, the Supreme Court set out a four-pronged test, requiring a valid state tax to: 1) apply to an activity with a substantial nexus with the taxing state; 2) be fairly apportioned; 3) not discriminate against interstate commerce; and 4) be fairly related to the services provided by the State. *Complete Auto*, 430 U.S. at 279, 287, 97 S.Ct. at 1079, 1083. When, as here, the state tax is on foreign, rather than merely interstate, commerce, the tax also must not: 1) create a substantial risk of international multiple taxation; or 2) prevent the federal government from speaking with one voice in its regulation of commercial regulations with foreign governments. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451, 99 S.Ct. 1813, 1823, 60 L.Ed.2d 336 (1979).

Diamond Shamrock argues that the tax here cannot pass the first and fourth prongs of the *Complete Auto* test because the goods are "in transit."[4] We disagree.[5] The essence of Diamond

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[4] Diamond Shamrock does not argue that the second and third prongs of *Complete Auto* are not met in this case. Even if there was a question of fair apportionment, it would have to be answered under Texas law since the oil is only being taxed in the State of Texas. The Supreme Court in *Goldberg v. Sweet*, 488 U.S. 252, 260-61, 109 S.Ct. 582, 588-89, 102 L.Ed.2d 607 (1989) noted that the central purpose behind the

Shamrock's argument is that because the oil is by stipulation "in transit" through Nueces County, it did not have the required nexus with the county to allow the tax. As the oil was at all times "entering, exiting, or passing through" the county, there was no "incidence" to justify taxation. As the Supreme Court held in *Quill Corp. v. North Dakota*, ____ U.S. ____, _____, 112 S.Ct. 1904, 1913, 119 L.Ed.2d 91 (1992), the first and fourth prongs of *Complete Auto* "limit the reach of the State taxing authority so as to ensure that State taxation does not unduly burden interstate commerce." *See also Itel Containers Int'l Corp. v. Huddleston*, ____ U.S. ____, _____, 113 S.Ct. 1095, 1104, 122 L.Ed.2d 421 (1993) (compliance by a tax with all four prongs of *Complete Auto* confirms "both the State's legitimate interest in taxing the transaction and the absence of an attempt to interfere with the free flow of commerce, be it foreign or domestic"). As with the Import-Export Clause, however, the "transit" at issue here is entirely within the State of Texas. Thus, the issue presented is whether satisfaction of the *Complete Auto* nexus requirements is precluded by that "transit," such that the taxation

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apportionment requirement of *Complete Auto* is "to ensure that each State taxes only its fair share of an interstate transaction." There is no possible question that this nondiscriminatory ad valorem tax fails the third prong of the test. Likewise, there is no question that the two additional tests of *Japan Line* are met in this case. The "one voice" requirement of *Japan Line* is the same as that required by *Michelin*, according to the Supreme Court in *Itel Containers Int'l Corporation v. Huddleston*, ____ U.S. ____, ____, 113 S.Ct. 1095, 1105, 122 L.Ed.2d 421 (1993), and *Michelin* held that nondiscriminatory ad valorem taxes do not conflict with this policy. And, no issue of potential multiple international taxation is raised by the stipulated facts of this case.

[5] We likewise reject Diamond Shamrock's argument that the District waived error under the Commerce Clause. The District's point of error to the court of appeals, complaining that the trial court erred by finding the property exempt from taxation, was broad enough to preserve error on both constitutional grounds.

of foreign oil entering and remaining in only one state unduly burdens or interferes with foreign commerce.[6]

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[6] We note that while the "transit" at issue here involves foreign goods that enter only one state and remain there, all but one of the many cases cited by Diamond Shamrock for the proposition that goods "in transit" are not taxable under the Commerce Clause involve taxes on goods "in transit" through one State on the way to or from another State or on the way to a foreign country. *See, e.g., Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 164-70, 74 S.Ct. 396, 399-403, 98 L.Ed. 583 (1954) (considering Texas tax on occupation of "gathering gas" where the taxable incidence was the taking of gas for the purpose of immediate interstate transmission); *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469, 474, 47 S.Ct. 170, 172, 71 L.Ed. 359 (1926) (considering Minnesota tax on goods already on way to Michigan); *State v. Anderson, Clayton & Co.*, 92 F.2d 104, 107 (5th Cir. 1937) (considering tariff within Texas on cotton destined for foreign countries and other States), *cert. denied*, 302 U.S. 747, 58 S.Ct. 265, 82 L.Ed. 578 (1937); *Calvert v. Zanes-Ewalt Warehouses, Inc.*, 502 S.W.2d 689, 692-93 (Tex. 1973), *appeal dism'd*, 416 U.S. 923, 94 S.Ct. 1921, 40 L.Ed.2d 279 (1974) (considering cigarette tax on cigarettes received in interstate commerce); *County of Harris v. Xerox Corporation*, 619 S.W.2d 402, 406 (Tex. Civ. App.--Houston [1st Dist.] 1981. writ ref'd n.r.e.), *rev'd on other grounds*, 459 U.S. 145, 103 S.Ct. 523, 74 L.Ed.2d 323 (1982) (considering tax on goods in customs bonded warehouses in Houston awaiting sale and shipment to foreign country); *American S.S. Co. v. Limbach*, 61 Ohio St.3d 22, 572 N.E.2d 629, 631-32 (1991) (considering use tax on vessel used to ferry out-of-state goods from transfer facility in Ohio to final destination in Ohio); *Board of Educ. v. Property Tax Appeal Bd.*, 106 Ill.App.3d 82, 62 Ill.Dec. 20, 21, 23, 435 N.E.2d 818, 819, 821 (1982) (considering Illinois tax on crude oil in transit from Oklahoma to Indiana). Diamond Shamrock cites *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), a case decided under the Carmack Amendment to the Interstate Commerce Act, which involves facts similar to those here and states in dicta that "modern interstate commerce analysis" is used to exempt goods in transit in foreign commerce from taxation. The court supports this proposition by citing *Michelin* which, for the reasons discussed above, do not lead us to the conclusion that goods in foreign commerce transit which enter only one state are exempt from taxation, under either

Obviously, where the four prongs of *Complete Auto* are not met, goods are not taxable under the Commerce Clause whether or not they are "in transit." And, the circumstances which make the goods "in transit" may inform a court's decision that the first and fourth nexus requirements of *Complete Auto* are not met. For instance, if oil in tanks or trucks merely passed through Nueces County without stopping, it would be "in transit" in a way that would cause it to have little or no nexus with the county. But under other circumstances, as in this case, there can be sufficient nexus to support a tax even if goods are technically "in transit."[7]

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the Import-Export Clause or the Commerce Clause.

[7] Our holding today is limited to foreign goods "in transit" through only one state, which remain in that state. Even as to goods in interstate commerce, however, the question of whether Diamond Shamrock's "in transit" argument has any remaining validity under the modern Commerce Clause analysis is questionable, at least to goods which have entered the state of their final destination. In *D.H. Holmes v. McNamara*, 486 U.S. 24, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988), the Supreme Court upheld the validity under the Commerce Clause of a Louisiana use tax imposed on catalogs printed outside of the State and shipped to prospective customers within the State. The Court applied the four-prong *Complete Auto* test and found that all four prongs were satisfied. Noting that *Complete Auto* abandoned the abstract notion that interstate commerce "itself" cannot be taxed by the States, the Court rejected what amounted to an "in transit" argument, stating:

> We recognized [in *Complete Auto*] that, with certain restrictions, interstate commerce may be required to pay its fair share of state taxes. Accordingly, in the present case, it makes little difference for Commerce Clause purposes whether appellant's catalogues "came to rest" in the mailboxes of its Louisiana customers or whether they were still considered in the stream of interstate commerce. This distinction may be of some importance for other purposes (in determining, for instance, whether a "taxable moment" has occurred ...), *but for Commerce Clause analysis it is largely irrelevant*.

This distinction is clear in our law. In *Exxon Corp. v. San Patricio County*, 822 S.W.2d 269 (Tex. App.--Corpus Christi 1991, writ denied), the county sought to tax oil which was held in pipeline company tanks for an average of only seventeen days awaiting shipment in the pipeline. In holding that the property had attained situs under the Texas situs statute, Tex. Tax Code Ann. § 21.02 (Vernon 1982), the court explained:

> We do not agree that when determining whether a large quantity of oil is to be taxed we should consider the situs of each individual barrel separately.... We do not view this mass of oil as a continual flow of singular barrels which independently do not remain in the County long enough to establish a tax situs there. Rather, because Exxon held a quantity of over 400,000 barrels of oil in San Patricio County in seventeen tanks at all times, a massive quantity was located in the County throughout 1987 and 1988 for more than a temporary period. That the particular oil present on January 1, 1988, shortly left the county is not determinative.

Exxon, 822 S.W.2d at 277-73.[8] Here, Diamond Shamrock argues that "[t]he incidence of the tax sought to be imposed is merely the oil's passing through--actual movement through--Nueces County." This argument is only persuasive, however, if one considers each barrel of oil separately. Instead, under *Exxon*,

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D.H. Holmes, 486 U.S. at 30-31, 108 S.Ct. at 1623-24 (citation omitted, emphasis added). *See also Havil v. Gurley*, 382 So.2d 109, 111 (Fla. Dist.Ct.App. 1980) (Florida state ad valorem tax on merchandise shipped from Tennessee did not violate Commerce Clause "even if the merchandise may be considered to be in transit," since the four prongs of *Complete Auto* were met).

[8] The *Exxon* opinion also provides support for our holding that the fourth prong of *Complete Auto* is met in this case. Considering the oil as present within the county in large quantities year-round, as opposed to focusing on specific barrels in the county for only a period of days, there can be no doubt that the tax in question here is fairly related to the government services that are provided.

the incidence of the tax sought to be imposed is the year-round presence of a large quantity of Diamond Shamrock's oil at rest in Nueces County, which receives government services. We hold that these facts satisfy the first and fourth nexus prongs of *Complete Auto*, and that no interference with foreign commerce is demonstrated in this case. Therefore, the tax here does not violate the Commerce Clause.[9]

The court's opinion in *Exxon* also answers the argument that, if the oil in question here is held to be taxable despite being "in transit," all goods that likewise enter the state of Texas as the state of final destination will become taxable merely by crossing the state line, thus creating the potential for taxation by numerous counties in the State. In rejecting a similar argument, the court explained:

> Exxon analogizes the constant flow of oil through working tanks and pipelines to the transport of oil in tanker trucks, whereby the trucks sporadically pass through a county and are located by chance within that county's boundaries on January 1st of a Tax Year. We disagree. In that scenario, individual units of oil are carried *directly through* the county, from border to border, with little or no delays so that a massive quantity of oil does not remain within the county continuously.

Id. at 273. Oil passing through a county without stopping, in pipelines or on trucks, would thus not be located in that county "for more than a temporary period" so as to allow taxation under the Code.

Under *Exxon*, the oil at issue here does attain situs in Nueces County and is taxable in Texas despite being "in transit" through the state. Indeed, the parties stipulated that if the crude oil had originated from sources within the State of Texas it would be subject to ad valorem taxation in this State. The "in transit"

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[9] For the same reasons, assuming the Import-Export Clause might be implicated by similar concerns in this case, taxation of the oil is not invalid under that constitutional provision.

nature of the oil does not call its taxation in Nueces County into question under either the Commerce Clause or the Import-Export Clause of the United States Constitution. Accordingly, we affirm the judgment of the court of appeals.

NUECES COUNTY APPRAISAL DISTRICT
and the Appraisal District Board of the
Nueces County Appraisal District,

Appellants,

v.

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY,

Appellee.

No. 13-91-308-CV
Court of Appeals of Texas
Corpus Christi
April 29, 1993

Russell R. Graham, Calame, Linebarger, Graham & Pena, Austin, for appellants.

Edward Kliewer, III, Kenneth Malone, Foster, Lewis & Langley, San Antonio, for appellee.

Before the court en banc.

OPINION

SEERDEN, Justice.

This is an ad valorem taxation case. The trial court entered a judgment against the Nueces County Appraisal District and the Appraisal Review Board of the Nueces County Appraisal District which decreed that the crude oil owned by Diamond Shamrock and located within appellants' appraisal jurisdiction on January 1st of 1988, 1989, and 1990, was exempt from ad valorem taxation for those years. By a single point of error, appellants complain that the trial court erred by holding that Diamond Shamrock's property was exempt from taxation. We reverse and render.

The Constitution of the State of Texas provides that "all real property and tangible personal property in this State, unless exempt as required or permitted by this Constitution . . . shall be taxed in proportion to its value . . . ." Tex. Const. art. VIII,

§ 1(b). *See* Tex. Const. art. VIII, §§ 1(d), 1-b, 1-j, 1-k, 2. Principles of federal law may limit a state's power to tax. Tex. Tax Code Ann. § 11.12 (Vernon 1992);[1] *Dallas County Appraisal Dist. v. L.D. Brinkman*, 701 S.W.2d 20, 20 (Tex.App.--Dallas 1985, writ ref'd n.r.e.). Thus, subject only to the state's constitutional exemptions and federal limitations, the State of Texas has the power and the duty to tax any real and tangible personal private property in the state. *Id.* When construing constitutional authorization of tax exemptions, "our courts must resolve any doubts against the exemption because tax exemptions are never favored." *Aransas County Appraisal Review Board v. Texas Gulf Shrimp*, 707 S.W.2d 186, 188 (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.).

The following facts, among others, were stipulated by the parties. The crude oil was shipped from foreign sources to American Petrofina's Harbor Island storage facility within the Nueces County Appraisal District to await shipment by pipeline to its final destination, Diamond Shamrock's refinery located approximately 100 miles from Harbor Island in Three Rivers, Texas. None of the crude oil was pumped or sold outside Texas. On January 1, 1988, 323, 019 barrels of crude oil were present for no longer than 12 days at the Harbor Island facility; 658,968 barrels were present on January 1, 1989, for no longer than 25.3 days; and, 408,667 barrels were present on January 1, 1990, for no longer than 18.1 days. At all times during the years 1987 through 1990, some volume of crude oil owned by Diamond Shamrock was present in the Harbor Island storage facility. While located in Nueces County, the crude oil received governmental services.

Further, Diamond Shamrock admits that the tax is valid except to the extent that it may be precluded by the Import-Export Clause and the Commerce Clause of the United States

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[1] Section 11.12 of the Texas Tax Code states that "[p]roperty exempt from ad valorem taxation by federal law is exempt from taxation." Other exemptions are delineated in §§ 11.11-11.24 and §§ 11.251-11.30.

Constitution, and, if valid, this property is subject to taxation in appellants' taxing district. The parties also stipulated that if the oil originated from sources within Texas, it would be subject to ad valorem taxation in Texas.

THE IMPORT-EXPORT CLAUSE

The Import-Export Clause states:

> No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States: and all such laws shall be subject to revision and control of the Congress.

U.S. Const. art. I, § 10, cl. 2.

Diamond Shamrock contends that the oil was in transit to its refinery and immune from property taxes under the Import-Export Clause until it arrived at its final destination in Three Rivers, Texas. Using the traditional analysis of taxation under the Import-Export Clause, as urged by Diamond Shamrock, all taxes, even nondiscriminatory property taxes, on imports and the importing processes are banned by the Clause. *City of Farmers Branch v. Matsushita Elec. Corp. of Am.*, 537 S.W.2d 452, 454 (Tex. 1976) (citing *Low v. Austin*, 80 U.S. (13 Wall.) 29, 20 L.Ed. 517 (1871) and *Brown v. Maryland*, 25 U.S. 262, 12 Wheat 419 6 L.Ed. 678 (1827)). A court's primary consideration, under this traditional approach, is whether the tax under review reaches imports or exports. *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 752, 98 S.Ct. 1388, 1400, 55 L.Ed.2d 682 (1978).

Diamond Shamrock argues that whether goods are in transit and not subject to local taxation depends on the intent of the parties. Diamond Shamrock relies on cases that determine the validity of the tax by analyzing the character of the taxed property. *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799

F.2d 697, 699, 700-01, 701 n. 2 (11th Cir. 1986); *State v. Anderson, Clayton & Co.*, 92 F.2d 104, 107 (5th Cir. 1937), *cert. denied*, 302 U.S. 747, 58 S.Ct. 265, 82 L.Ed. 578 (1937); *Binder- up v. Pathe Exch., Inc.*, 263 U.S. 291, 309, 44 S.Ct. 96, 99, 68 L.Ed. 308 (1923).

In *Swift*, the Court considered the intent of the parties and whether the shipment was a part of a larger journey originating in a foreign country. It determined whether the intrastate shipment of machinery was a continuation of foreign commerce under the Carmack Amendment to the Interstate Commerce Act. Swift, 799 F.2d at 699, 700-01, 701 n.2. *Swift*, 799 F.2d at 699, 700-01, 701 n. 2. Appellants correctly argue that the intentions of the parties might be relevant for defining the nature of a shipment when the dispute is between a common carrier and its client and the issues are contractual in nature. However, under the present facts we are concerned, not with a contract as it applies to an appropriate act, but with the validity of a tax imposed upon one of the parties by a third-party taxing district.

Diamond Shamrock cites the following propositions in *Anderson, Clayton*. "[T]he intention existing at the time the movement starts governs and fixes the character of the shipment," and "[t]emporary stoppage within the state, made necessary in furtherance of the interstate carriage, does not change its character." *Anderson, Clayton*, 92 F.2d at 107. Diamond Shamrock relies on cases that reflect the traditional analysis of taxation under the Import-Export Clause.

The United States Supreme Court abandoned the traditional inquiry into the character of the taxed property in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 279, 96 S.Ct. 535, 537, 46 L.Ed.2d 495 (1976). *See R.J. Reynolds Tobacco Co. v. Durham County, North Carolina*, 479 U.S. 130, 152, 107 S.Ct. 499, 513, 93 L.Ed.2d 449 (1986); *Xerox Corp. v. County of Harris*, 459 U.S. 145, 150-51, 103 S.Ct. 523, 526-27, 74 L.Ed.2d 323 (1982); *Washington Stevedoring*, 435 U.S. at 759, 98 S.Ct. at 1404; *Recent Cases*, 29 Vanderbilt L.Rev. 487, 493-94 (1978). In *Michelin*, the Court initiated a new, fundamentally different

approach to the Import-Export Clause. Under the contemporary analysis, instead of focusing on whether the property has lost its status as an "import," the Court focused on whether the tax sought to be imposed is an "impost or duty." *Michelin*, 423 U.S. at 290-94, 96 S.Ct. at 543-45; *see Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 360, 104 S.Ct. 1837, 1842, 80 L.Ed.2d 356 (1984); *Louisiana Land & Exploration v. Pilot Petroleum*, 900 F.2d 816, 820-21 (5th Cir. 1990), *cert. denied*, 498 U.S. 897, 111 S.Ct. 248, 112 L.Ed.2d 207 (1990). Appellants urge that, under the holding in *Michelin*, the oil was not in transit for taxation purposes. Additionally, even if "in transit," appellants contend that it was not automatically immune from taxation.

"[T]he [Import-Export] Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State." *Michelin*, 423 U.S. at 290, 96 S.Ct. at 543. The Court in *Michelin* concluded that an exaction by a state would be objectionable if it offended any of the three policy considerations which led the framers to incorporate the Import-Export Clause into the Constitution. These considerations are:

> 1. [T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power;
>
> 2. [I]mport revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and
>
> 3. [H]armony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the inland States not situated as favorably geographically.

Michelin, 423 U.S. at 285-86, 96 S.Ct. at 540-41. We conclude that the tax at issue in this case offends none of these policies.

First, this property tax can have no impact on the federal government's exclusive regulation of foreign commerce. By definition, it does not fall on imports because of their place of origin. *Michelin*, 423 U.S. at 286, 96 S.Ct. at 541.

Second, the federal government retains the exclusive right to all revenues from exactions on imports and exports. Unlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country, ad valorem property taxes are taxes by which a state apportions the cost of such services as police and fire protection among the beneficiaries. *Michelin*, 423 U.S. at 287, 96 S.Ct. at 541; *Matsushita*, 537 S.W.2d at 454. Although the Import-Export Clause prohibits state taxation based on the foreign origin of the imported goods, it cannot be read to accord imported goods preferential treatment that permits escape from uniform nondiscriminatory taxes for services which the state supplies. *Michelin*, 423 U.S. at 286-87, 96 S.Ct. at 541-42. There is no reason why Diamond Shamrock should not bear its share of these costs.

Diamond Shamrock argues that the only reason for the oil being in the Harbor Island tanks was because it could not be transported out more quickly through the pipeline. However, the stipulations reveal that Diamond Shamrock's Three Rivers storage capacity was only 200,000 barrels while the average volume in the Harbor Island facility on January 1st of the relevant years was 463,550 barrels. It appears that Diamond Shamrock could have stored the oil in these tanks until such time as the capacity of the tanks at Three Rivers could have accepted it. We conclude that a substantial amount of oil was stored in the Harbor Island facility because it had a higher comparable capacity than the tanks at Three Rivers.

Finally, this tax in no way conflicts with the third purpose of the Import-Export Clause. With this concern the framers desired to encourage harmony among the states. *Michelin*, 423 U.S. at 286-88, 96 S.Ct. at 541-42. The crude oil originated totally from foreign sources. It entered the United States at the Harbor Island facility located within the Nueces County Appraisal District. The

parties stipulated that the final destination of the crude oil was Three Rivers, Texas. None of the crude oil in question was pumped or sold outside the State of Texas in its present form. The import was concluded when offloaded and put into storage tanks and was stored there continuously until it was transferred to the tanks in Three Rivers. Under these facts, there was never an opportunity for disturbing harmony among the states. This tax has no effect on the cost of property moving to any inland state, but simply requires appellee to bear a share of the cost of government in proportion to its ownership of this property.

We conclude that once the purposes of the Import-Export Clauses of the United States Constitution have been satisfied, as in this case, the concept of "in transit" loses any rational meaning. At that point the taxability of the property becomes a matter for the state. It is clear that had this oil been produced in another taxing district in Texas and transferred to the Harbor Island Storage facilities under the same circumstances and for the same purposes, Texas law would hold the appellants' tax valid. *See Exxon Corp. v. San Patricio County Appraisal Dist.*, 822 S.W.2d 269 (Tex.App.--Corpus Christi 1991, writ denied). The fact that this crude oil came from a foreign country makes it no more "in transit" under Texas law than it would have been in the *Exxon* case.

THE COMMERCE CLAUSE

The Commerce Clause grants Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes . . . ." U.S. Const. art. I, § 8, cl. 3.

Initially, Diamond Shamrock contends that because appellants failed to brief or argue the Commerce Clause question, they have waived the right to challenge the trial court's judgment on that issue. However, appellants filed a reply brief that argues the validity of the tax under the Commerce Clause. The issue has not been waived on appeal.

Diamond Shamrock urges that the traditional rule which provides a blanket prohibition against any state taxation imposed

directly on an interstate [or foreign] transaction, applies in this case. *See Freeman v. Hewit*, 329 U.S. 249, 256-57, 67 S.Ct. 274, 278-79, 91 L.Ed. 265 (1946). Appellants contend that the Supreme Court has abandoned the traditional analysis of interstate and international commerce immunities from state taxation, and has moved to a review of the tax in question to determine whether it discriminates against such commerce or fairly relates to services provided by the State or both. *See Michelin*, 423 U.S. at 286-89, 96 S.Ct., at 541-42; *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 282, 97 S.Ct. 1076, 1080, 51 L.Ed.2d 326 (1977); *Washington Stevedoring*, 435 U.S. at 753, 98 S.Ct. at 1400; *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108, 95 S.Ct. 1538, 1543, 44 L.Ed.2d 1 (1975).

Complete Auto sets out the test for the validity of taxes on interstate commerce. A tax is sustainable against a Commerce Clause challenge when the tax 1) is applied to an activity with a substantial nexus with the taxing state, 2) is fairly apportioned, 3) does not discriminate against interstate commerce, and 4) is fairly related to the services provided by the State. *Complete Auto*, 430 U.S. at 279, 97 S.Ct. at 1079; *see Washington Stevedoring*, 435 U.S. at 750, 98 S.Ct. at 1399. The Court in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451, 99 S.Ct. 1813, 1823, 60 L.Ed.2d 336 (1979), formulated a more extensive foreign commerce clause test by adding two inquiries to the existing *Complete Auto* interstate commerce clause test: 1) whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and 2) whether the tax may impair federal uniformity and prevent the federal government from speaking with one voice when regulating commercial relations with foreign governments. *Japan Line*, 441 U.S. at 448, 451, 99 S.Ct. at 1821, 1823. We conclude that the foreign commerce clause test is satisfied, thus, no impermissible burden on this foreign commerce exists.

Diamond Shamrock urges the tax in question is impermissible under either the *Complete Auto* or the *Japan Line* tests. Under the first prong of *Complete Auto*, Diamond Shamrock contends that the crude oil did not have a sufficient nexus to Nueces

County because it was only entering, exiting, or passing through the county. The stipulated facts reveal that some of Diamond Shamrock's oil was present within appellants' boundaries at all times during the tax years in question. The oil was consumed in the state. The oil present on January 1st of each of the three years remained for a period of 12, 25, and 18 days, respectively. The oil received governmental services in Nueces County. We conclude that the oil had a substantial local nexus with the taxing entity, satisfying prong one.

Under the second prong of *Complete Auto*, Diamond Shamrock contends that because appellants' tax is on the full value of the oil on the assessment date, it does not meet the apportionment requirement of *Complete Auto*. We disagree.

The apportionment test is designed to avoid multiple taxation of the same property or activity among the states or nations. Its purpose "is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260, 109 S.Ct. 582, 588, 102 L.Ed.2d 607 (1989). Under the facts of this case, no multiple burdens were demonstrated. The tax could occur in no other state because the oil had no contact with any other state. Additionally, the facts revealed no apportionment issue involving the importing country.

Even if there were an apportionment issue as it relates to the portion of the property present within the county's boundary, the burden of proving the tax unfair or that an exemption applies is on the taxpayer who makes such a claim. *See Central R.R. Co. of Pennsylvania v. Pennsylvania*, 370 U.S. 607, 613-17, 82 S.Ct. 1297, 1302-04, 8 L.Ed.2d 720 (1962). To meet his burden the taxpayer must show that the taxing state is taxing more than its fair share of the property's value. The record reveals Diamond Shamrock contested neither the volume nor the value of the property which appellants sought to tax. As a result, it has waived any claim that this state has sought to impose a tax on more than its fair share of the property. If property is located in the taxing district on the assessment day, the presumption is that it is taxable. The burden should be on the person or entity taxed

to prove otherwise. *See* Tex.Tax Code Ann. § 21.02(1) (Vernon 1992); *Davis v. City of Austin*, 632 S.W.2d 331, 333 (Tex. 1982).

The record contains nothing that shows the tax discriminates against interstate or foreign commerce, the third prong of *Complete Auto*. Clearly, this nondiscriminatory tax passes this test because the taxing state only taxed that property which was present within its boundaries and received governmental services regardless of its origin or its destination.

Under *Complete Auto*'s fourth prong, "the tax is fairly related to the services provided by the State," Diamond Shamrock repeats its argument involving nexus and appropriation with the same result: the facts, as articulated under prong one, show a clear relationship exists between the tax and the services provided. Thus, the fourth prong is met.

Next, we review the two foreign commerce requirements identified in *Japan Line*. Diamond Shamrock asserts that the tax enhances the risk of multiple taxation and impairs federal uniformity. Specifically, Diamond Shamrock urges that full taxation on goods in transit may provoke retaliation by foreign nations. Relying on *Japan Line*, Diamond Shamrock argues that since appellants taxed the crude oil on its full value, multiple taxation is inevitable and the United States has no way to prevent that multiple taxation. *See Japan Line*, 441 U.S. at 447, 99 S.Ct. at 1820.

The property in question in *Japan Line* was shipping containers owned by Japan Line, Inc., a Japanese domiciliary. *Japan Line*, 441 U.S. at 436, 99 S.Ct. at 1815. The containers were repeatedly sent back and forth between Japan and the United States. *Id.* All containers were subject to property tax in Japan and, in fact, were taxed in Japan. *Id.* The County of Los Angeles sought to tax the same entity on the assessed value of the containers present in its jurisdiction on the assessment date. *Id.* at 437, 99 S.Ct. at 1815. The Court held that because Japan had the right to tax the property value of the containers in full, California's tax necessarily produced multiple taxation. *Id.* at

447, 99 S.Ct. at 1820. The Court further held that the California tax prevented the United States from speaking with one voice in foreign affairs because the risk of retaliation by Japan, under these circumstances, was acute. *Id.* at 453, 99 S.Ct. at 1824.

No similar facts exist in the present case. Once the crude oil enters this country, the application of appellants' tax does not necessarily result in double taxation. In act, it is undisputed that if the property is subject to property taxes in Texas, its taxable situs is Nueces County, thus avoiding the possibility of double taxation within the state. Diamond Shamrock's arguments under *Japan Line* concerning an enhanced risk of multiple taxation and an impairment of federal uniformity have no application in this case.

Finally, an ad valorem property tax that conflicts with the three basic purposes of the Import-Export Clause would also be invalid under the Commerce Clause analysis because the policies animating both clauses are much the same. *Japan Line*, 441 U.S. at 449 n. 14, 99 S.Ct. at 1822 n. 14. As previously discussed, no conflict exists between this tax and the federal government's exclusive regulation of foreign commerce or its exclusive right to all revenues from exactions on imports and exports, or the framers' desire to encourage harmony among the states.

We hold that the tax is sustainable against a Commerce Clause challenge.

Because the Import-Export Clause and the Commerce Clause have no application in this case, the law of the State of Texas applies. Thus, we conclude that Diamond Shamrock's crude oil located in the Harbor Island facility on January 1st of 1988, 1989, and 1990 is not exempt from the ad valorem property taxes for those years.

We reverse the judgment of the trial court and render that Diamond Shamrock's property is not qualified as exempt property.

Concurring opinion by DORSEY, J.

Dissenting opinion by Assigned Justice GERALD T. BISSETT,[2] joined by NYE, C.J., and KENNEDY, J.

DORSEY, Justice, concurring.

I join in the well-written majority opinion authored by Justice Seerden. I write to express my analysis of the case, because I do not believe the following issue is illuminated by the exegesis of the dissent.

Both the Import-Export Clause and the Commerce Clause of the federal constitution prohibit a state from levying a duty on goods passing through that state, when those goods originate from and are destined for a foreign land or sister state. If the goods are merely "passing through" bound for another jurisdiction, they are in transit and not subject to the local state's taxation.

The oil at issue was produced abroad, transported by ship until unloaded into the terminal at Harbor Island, located in Nueces County, Texas. The oil will be transported from there by pipeline to a refinery in Live Oak County, Texas, where it will be refined and transformed into gasoline and other products. There is no assertion that the resulting gasoline and related products will be transported from Texas to be consumed elsewhere. The oil is owned by Diamond Shamrock at all relevant times.

The issue in the present case is whether the State of Texas may tax the oil in the storage tanks in Nueces County. The issue is *not* which taxing entity within the State of Texas is the proper taxing agency. The Import-Export and Commerce Clauses are restrictions on the State vis-a-vis the Federal Government. If the goods sought to be taxed cease being in transit within the state, the State may impose non-discriminatory ad valorem taxes.

The power of the State to tax being at issue, it is not important where within the state the material finally comes to rest and ceases to be in transit. It is immaterial for federal constitutional

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[2] Assigned to this Court by the Chief Justice of the Supreme Court of Texas pursuant to Tex. Gov't Code Ann. § 74.003 (Vernon 1988).

purposes that the final destination of the imported crude oil is Nueces County or Live Oak County, Texas. If the State of Texas has jurisdiction to tax, a dispute regarding which taxing authority within the state may levy ad valorem taxes is determined by state law. Neither the Import-Export Clause nor the Commerce Clause of the United States Constitution is implicated.

GERALD T. BISSETT, Justice

(Assigned), dissenting.

I respectfully dissent. I would hold that both the Import-Export Clause and the Commerce Clause in the United States Constitution prohibit the tax in this case.

First, in addition to the summary of the facts set out in the majority opinion, I add the following facts which were stipulated by the parties:

> The crude oil at issue originates totally from foreign sources, and is transmitted by ships through the Gulf of Mexico to the Harbor Island storage facility located within the Nueces County Appraisal District as part of and incident to the transportation of the crude oil to its ultimate destination outside the Nueces County Appraisal District. The presence of the crude oil within the Nueces County Appraisal District, while in transit to its ultimate destination, is reasonably necessary for the accommodation of the transportation of the crude oil into two (2) pipelines owned by American Petrofina which transports the crude oil 36.2 miles to a metering station in Refugio, Texas, from which it is pumped 65 miles in a pipeline owned by plaintiff to its ultimate predetermined destination, the Plaintiff's refinery located in Three Rivers, Texas. Plaintiff does not divert the oil to any other facility other than the Three Rivers refinery.
>
> No manufacturing, assembly, servicing, processing, commingling with other oil from other sources, or refining of any kind is performed on the subject crude oil while located within the Nueces County Appraisal District, while the crude

oil is awaiting its accommodation of transportation to its ultimate destination.

* * * * * *

[I]n 1988, the owner of the Harbor Island storage facility paid One Hundred Twenty-Nine Thousand Six Hundred Seventy-nine and 70/100 Dollars ($129,679.70) in ad valorem taxes, in 1989 paid One Hundred Thirty-three Thousand Two Hundred Six and 53/100 Dollars ($133,206.53) in ad valorem taxes and in 1990 paid One Hundred Forty Thousand Nine Hundred Three and 17/100 Dollars ($140,903.17) in ad valorem taxes.

THE IMPORT-EXPORT CLAUSE

The majority relies primarily upon the holding in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976), as authority for holding "that the trial court erred in holding that Diamond Shamrock's property was exempt from taxation." That case differs in a very material and substantial way from the facts in the case at bar.

In *Michelin*, the taxing authorities of Guinsett County, Georgia, assessed ad valorem taxes against tires and tubes imported by the taxpayer (Michelin) from foreign sources that were included on the assessment dates in an inventory maintained at its wholesale distribution center in the county. The *Michelin* Court noted that "nothing in the history of the Import-Export Clause remotely suggested that a non-discriminatory ad valorem property tax, also imposed on imported goods *that are no longer in transit* was objectionable to the Framers of the Constitution." (Emphasis added). *Michelin*, 423 U.S. at 286, 96 S.Ct. at 541. In discussing the third policy consideration set out in the opinion "the preservation of harmony between the states," the Court observed that the Clause "prevented imposition of exactions that were no more than transit fees on the privilege of moving through a State." *Id.*, 423 U.S. at 290, 96 S.Ct. at 543. The court then said that non-discriminatory ad valorem property taxes stand on a different footing,

> and to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed.

Id., 423 U.S. at 290, 96 S.Ct. at 543.

It appears that the Court's language, quoted above, when read in context, is that a tax on goods in transit, for merely moving through a taxing jurisdiction, like appellants' tax herein, is prohibited.

The focus of the above quoted language of the Court in *Michelin* is not on the "through the State," but is on the "in transit" nature of the goods. *Id.* The critical inquiry is not whether the leg of the journey in the United States crosses a state border, but whether the leg of the journey in the United States was intended to be a part of a larger journey that originated in a foreign nation.

It was held in *Michelin*:

> *Petitioner's tires in this case were no longer in transit.* They were stored in a distribution warehouse from which petitioner conducted a wholesale operation, taking orders from franchised dealers and filling them from a constantly replenished inventory. The warehouse was operated no differently than would be a distribution warehouse utilized by a wholesaler dealing solely in domestic goods, and we therefore hold that the nondiscriminatory property tax levied on petitioner's inventory of imported tires was not interdicted by the Import-Export Clause of the Constitution. (Emphasis added)

Id., 423 U.S. at 302, 96 S.Ct. at 548.

The United States Supreme Court stated in *R.J. Reynolds Tobacco Co. v. Durham County, N.C.*, 479 U.S. 130, 107 S.Ct. 499, 93, L.Ed.2d 449 (1986):

> This Court has observed that in *Michelin* it limited its holding to the imported goods 'no longer in transit'. . . . The imported tobacco here, we repeat, has nothing transitory about it: it has reached its State--indeed, its County--of destination. . . .

Id., 479 U.S. at 154-55, 107 S.Ct. at 514.

In *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 754-55. 98 S.Ct. 1388, 1401-02, 55 L.Ed.2d 682 (1978), the goods were in transit. The tax was not upon the goods themselves, but was on the business or occupation of stevedoring, loading and unloading cargo, which occurred entirely within the state. By undertaking this analysis and upholding the tax because it was not on the goods in transit, the court again recognized that goods in transit are not taxable. The court specifically observed that the immunity of services incidental to interstate transit is not so broad as the immunity of the goods themselves. Justice Powell noted in his concurring opinion that while the nondiscriminatory tax in *Michelin* was held not to violate any of the policies that underlie the Import-Export Clause,

> the Court suggested that even a nondiscriminatory tax on goods merely in transit through the state might run afoul of the Import-Export Clause.

Id., 435 U.S. at 762, 98 S.Ct. at 1405.

It has long been the rule under federal law that the states may not tax personal property actively in transit. Mr. Justice Rutledge stated in *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70, 67 S.Ct. 1062, 91 L.Ed. 1346 (1947):

> [I]f the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey . . . mere changes in the method of transportation do not affect the continuity of the transit. . . .

Id., 331 U.S. at 73, 67 S.Ct. at 1064-65.

It was stated in *Champlain Realty Co. v. Town of Brattleboro*, 260 U.S. 366, 376-77, 43 S.Ct. 146, 149, 67 L.Ed. 309, 314 (1922):

> [I]f the interruptions (of the goods in transit) are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken. . . . In other words, in such cases interstate continuity of transit is to be determined by a consideration of the various factors of the situation. Chief among these are the intention of the owner, the control he retains to change destination, the agency by which the transit is effected, the actual continuity of the transportation, and the occasion or purpose of the interruption during which the tax is sought to be levied.

See also, *Hughes Brothers Timber Co. v. Minnesota*, 272 U.S. 469, 471, 47 S.Ct. 170, 171, 71 L.Ed. 359 (1926); *General Oil Co. v. Crain*, 209 U.S. 211, 230-31, 28 S.Ct. 475, 482, 52 L.Ed. 754, 765 (1908); *Texas v. Anderson, Clayton & Co.*, 92 F.2d 104, 107 (5th Cir. 1937), *cert. denied*, 302 U.S. 747, 58 S.Ct. 265, 82 L.Ed. 578 (1937).

The Supreme Court of Texas promulgated the following rule in *Calvert v. Zanes-Ewalt Warehouse, Inc.*, 502 S.W.2d 689 (Tex. 1973), *appeal dism'd*, 416 U.S. 923, 94 S.Ct. 1921, 40 L.Ed.2d 279 (1974):

> It is the established rule that goods in interstate transit are not subject to local taxation. However, where there is an interruption at a point between the point of origin and the final destination, the controlling principle has been stated as follows: any interruption of the movement of commodities at an intermediate point between origin and final destination which is not incidental to the transportation or the use of the means of transportation (or, being so incidental, is used or extended for the purposes of the owner not incidental to the transportation or the means used therefor) breaks the continuity in transit and subjects the shipment to local taxation at the point of interruption. . . .

* * * * * *

> The crucial question in determining whether the taxing power of the State may be exerted is that of "continuity of transit."

Id., 502 S.W.2d at 692.

The same rules apply in a case where the property is in foreign transit, as it was in the instant case.

In *City of Farmers Branch v. Matsushita Elec. Corp.*, 537 S.W.2d 452 (Tex. 1976), *cert. denied*, 429 U.S. 861, 97 S.Ct. 164, 5 L.Ed.2d 139 (1976), the court stated that it understood *Michelin* to hold

> that where the tax is not upon the importation or movement of imported goods, and *where the goods are no longer in transit*, the goods are subject to the imposition of nondiscriminatory ad valorem property taxation by the states and their subdivisions. (Emphasis added)

Id. at 453.

What *Michelin* did was to shift the inquiry from the "original package" doctrine and the "mingled with other goods in the state" test regarding goods that were no longer "in transit." *See Michelin*, 423 U.S. at 294-302, 96 S.Ct. at 544-48. *Michelin* did not, however, apply this analysis to goods that were still in transit. *Michelin*, 423 U.S. at 286, 290 & 300-01, 96 S.Ct. at 541, 543 & 547-48.

Michelin did not determine whether the tires and tubes in fact were imports under the Import-Export Clause; instead it focused on the nature of the tax. It decided that the tax did not offend any of the three policies that were to be served under the Clause. The *Michelin* Court left open the question of whether a tax on foreign goods would constitute an "impost" or "duty" under the Clause. *See Louisiana Land & Exploration Co. v. Pilot Petroleum*, 900 F.2d 816, 820 (5th Cir. 1990), *cert. denied*, 498 U.S. 897, 111 S.Ct. 248, 112 L.Ed.2d 207 (1990).

To permit a coastal state to impose a direct tax on foreign goods in the import and export streams of foreign commerce would circumvent the objection that the United States Government must speak with one voice when regulating commercial relations with foreign governments. The taxes levied by the Appraisal District are not an indirect tax like the taxes levied in *Michelin* and *Washington Stevedoring*; they are not taxes on stored inventory (*Michelin*), nor are they taxes on a business which is related to imports or exports (*Washington Stevedoring*). Instead, the taxes in the present case are direct taxes levied on the goods themselves while they are in transit. *See*, *Louisiana Land & Exploration*, 900 F.2d at 821.

As a general rule, goods stopped in transit for reasons other than necessary transportation accommodations cease to be in transit so that taxation of such goods in the state is proper. However, once the interstate or foreign commerce is established at the time movement begins, the temporary stoppage within the state made necessary in order to deliver the goods to its final destination does not change the character of the goods. The goods are still in foreign commence and retain such character until they reach their final destination.

The only purpose for the stopover at Harbor Island in the case now before this court was to accommodate the transportation of oil to its final destination. "In all shipments by water there are delays at the seaport. . . . It would be idle to say that such delays break the continuity of the interstate journey and cause the freight to come to rest within the state." *Anderson, Clayton*, 92 F.2d at 107. The change in the mode of transportation from ship to pipeline effected at Harbor Island was absolutely necessary, and it did not affect the continuity of the transit of appellee's oil. *See Hughes Bros.*, 272 U.S. at 474, 47 S.Ct. at 172. This change was part of the transit itself. The stoppage in the transportation of the oil was not for the benefit of appellee. No profit to appellee can be attributed to such stoppage.

All of the crude oil in question originated from foreign sources, as brought to the United states by ship, and its final

destination was intended by appellee to be Three Rivers, Texas, which was not within the Nueces County Appraisal District. It was located at American Petrofina's Harbor Island storage facility, in Nueces County, on January 1 of the relevant years, only "as part of and incident to" its transportation to its ultimate, predetermined and final destination. The stopover at Harbor Island was necessary to effectuate the change in means and mode of transportation from ship to pipeline. The last 100 inland miles of the continuous trip from the storage facility at Harbor Island in Nueces County to appellee's refinery were, by necessity, made first by an American Petrofina's pipeline and then by appellee's pipeline from Refugio, Texas, to the refinery. The accommodation of transportation for this last leg of the journey resulted in none of the oil being at Harbor Island for more than 25.3 days during any tax years concerned here, and in 1988 none was present for more than 12 days. While some of appellee's oil was present at the facility at all times during the years 1988, 1989, and 1990, it was there at all times as a part of and incident to this transportation process to its predetermined destination, the refinery.

The majority reasons that appellee's oil is taxable by them even though it is "in transit," relying upon *Youngstown Sheet and Tube Co. v. Bowers*, 358 U.S. 534, 79 S.Ct. 383, 3 L.Ed.2d 490 (1959), and *R.J. Reynolds Tobacco Co. v. Durham County, N.C.*, 479 U.S. 130, 107 S.Ct. 499, 93 L.Ed.2d 449 (1986). The reliance is misplaced.

In *Youngstown*, the goods (ore and lumber) were at their final destination and were being used in the company's manufacturing process. By contrast, when appellants in the present case sought to tax appellee's oil, it was not then in appellee's manufacturing process; it was in the custody of another company, American Petrofina, solely incident to and for the purpose of transporting it to appellee's refinery.

If irrevocable commitment to supply appellee's refinery was all that was required, the *Youngstown* Court's discussion of the actual use of the goods at the final destination would have been

superfluous. *See Youngstown*, 358 U.S. at 546-47, 79 S.Ct. at 390-91. *Youngstown* upheld the tax because the court found that the manufacturer there had so acted upon the goods as to cause them to lose their import character

> by irrevocably committing them, *after their importation journeys [had] definitely ended*, to "use in manufacturing" at the plant and point of final destination, and by "entering" and "using" them "in manufacturing" at that place[.] (Emphasis added)

Youngstown, 358 U.S. at 543, 79 S.Ct. at 388. Here again, the court's entire consideration of all these factors would have been utterly useless if merely entering the state was sufficient to invoke the power to tax. All the court would have had to find was that the goods were in the state; therefore, they were taxable

In *R.J. Reynolds*, the Court upheld the tax against an Import-Export challenge because the tax was levied by state taxing agencies on tobacco that was stored in customs bounded warehouses, for two years where, customarily, *Reynolds* cleaned, sorted, repacked, as well as stored, the tobacco. The warehouses were owned by *Reynolds*. The Court concluded that no congressional intent to confer "in transit" status on all goods could be inferred, and held that the tobacco was not "in transit" and that the tax was permissible since the tobacco had reached its final destination.

In *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583 (1954), the pipeline company maintained a continuous flow of gas from Texas to its consumer outside Texas. Nothing was done to the gas at the point of taking; it was unchanged. The Court held that a tax on the taking of the gas into the pipeline was a tax on actual movement in commerce, and therefore, was impermissible.

The taxes which appellants propose to levy against appellee's oil are not a *quid pro quo* for direct benefits conferred upon appellee by the State of Texas and Nueces County. This oil merely passes through appellants' jurisdiction. Undoubtedly,

American Petrofina, the owner of the Harbor Island storage facility, receives benefits from the state and Nueces County. These benefits may arguably inure indirectly to appellee's oil in American Petrofina's care, custody, and control; however, appellants are fully compensated for any indirect benefits they confer on appellee's oil by taxes in the thousands of dollars paid on the facility by American Petrofina. That facility is properly taxed on the basis of its use and the income from that use is reflected in its taxable value and the taxes ultimately paid. *See* Tex. Tax Code Ann. §§ 1.04 & 23.01 (Vernon 1982, Supp. 1991). In turn, appellee pays for any benefits indirectly conferred on it in that the price it pays to American Petrofina for temporary storage includes price factors in American Petrofina's ad valorem tax costs. The imposition of appellants' tax on appellee's oil as it merely passes through Nueces County would, thus, result in appellee paying for any minimal services it might receive at a greater rate than those present full time in the Appraisal District would pay for full time services.

In summary, the federal courts and the Texas Supreme Courts have established the following criteria to determine whether the goods are in transit: 1) was there a stoppage in transportation, and if so, what was the purpose of the stoppage; 2) at the time of taxation was the final destination of the goods determinable; and 3) was the stoppage a necessary delay, or an accommodation to the means of transportation, or for business purposes and profits of the company. *County of Harris v. Xerox Corp.*, 619 S.W.2d 402, 406 (Tex.Civ.App.--Houston [1st Dist.] 1981, writ ref'd n.r.e.), *reversed on other grounds*, 459 U.S. 145, 103 S.Ct. 523, 74 L.Ed.2d 323 (1982).

The tax in the instant case is a direct tax on imported goods within the meaning of *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 78-79, 67 S.Ct. 156, 161-62, 91 L.Ed. 80 (1946), and as such is in violation of the Import-Export Clause.

I am of the opinion that the stoppage of the oil at the storage facility in preparation for its movement by pipelines to its final

destination at appellee's refinery in Live Oak County did not deprive the oil of its foreign character. *See Anderson, Clayton & Co.*, 92 F.2d at 107.

None of the authorities cited in the majority opinion present facts that are in any way similar to those in the case at bar. In those cases, the goods had reached their final destination and had thereby lost their foreign or interstate character, or the tax was levied on activity of a business concerning imports and exports. That is not the case here.

The conclusion by the majority "that a substantial amount of oil was stored in the Harbor Island facility because it had a higher comparable capacity than the tanks at Three Rivers" is not warranted by the stipulation of facts. Furthermore, it is highly speculative and is not "backed up" by any facts.

I conclude that the Import-Export Clause exempts the oil in question from ad valorem taxation, and the judgment of the trial court should be affirmed for that reason alone.

THE COMMERCE CLAUSE

The crude oil was also exempt from taxation by appellants by the Commerce Clause of the United States Constitution, reading

> Section 8. The Congress shall have power to lay and collect Taxes, Duties, Imposts end Excises, to pay the Debts and provide for the common Defence and general Welfare of the United states; but all Duties, Imposts and Excises shall be uniform throughout the United States;
>
> * * * * * *
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> * * * * * * *

U.S. Const. art I, § 8, Cl. 3.

The Clause is not only a grant of power to Congress, but is a limitation upon the power of the states. *See Richfield Oil Corp.*

v. State Board of Equalization, 329 U.S. 69, 75, 67 S.Ct. 156, 159, 91 L.Ed. 80 (1946).

A leading case on the subject is *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), in which it was held that state ad valorem taxes may be assessed on interstate commerce goods when the tax is applied to an interstate activity

> with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.

Id., 430 U.S. at 274, 97 S.Ct. at 1076. The same rule applies to foreign commerce.

The first requirement in *Complete Auto* is that the *activity* taxed have a nexus within the state. There, Mississippi imposed a tax on gross income derived from the transportation of persons or property within the state. The petitioner's business was to deliver automobiles, assembled outside the state and shipped into it, to dealers in the state for sale. The Court rejected

prior authorities, holding that a tax on the privilege of carrying on certain *activities* in a state in connection with an interstate business is not *per se* violative of the Commerce Clause, and upheld the tax. The Court, in so deciding, assumed that the transportation of the automobiles in the state was interstate commerce. The Court thus recognized that had the automobiles in question not been in transit in interstate commerce, there would have been no complaint possible about the tax.

The central purpose of the *Complete Auto* requirement of fair apportionment is to insure that each State taxes only its fair share of an interstate transaction. *Goldberg v. Sweet*, 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989). Since appellants' tax is on full value, and unapportioned, it appears, without further analysis, that this tax does not meet the apportionment requirement. *See Tyler Pipe Indus., Inc. v. Washington State Dept.*, 483 U.S. 232, 251, 107 S.Ct. 2810, 2822, 97 L.Ed.2d

199 (1987). Thus, appellants' tax is improper for this reason alone.

The third prong of the *Complete Auto* test, which prohibits taxes that discriminate against commerce, has a deeper meaning than the mere prohibition of the allocation of tax burdens between insiders and outsiders in a facially discriminatory manner.

The fourth prong of the *Complete Auto* test is closely related to the first. The purpose of this prong is to insure that a state's tax burden is not placed upon persons who do not benefit from services provided by the State. *Commonwealth Edison v. Montana*, 453 U.S. 609, 626, 101 S.Ct. 2946, 2988, 69 L.Ed.2d 884 (1981). The requirement of the fourth prong goes beyond that of the first in that the first prong requirement of a nexus of the goods themselves with the state must be met before *any* tax may be levied. *Id*. Beyond that threshold requirement, the fourth prong additionally requires that the *measure* of the tax must be reasonably related to the extent of the contact.

In *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 283-85, 107 S.Ct. 2829, 2840-41, 97 L.Ed.2d 226 (1987), the Court held that Pennsylvania's flat tax on the operation of all trucks on the state's highways imposed a disproportionate burden on interstate trucks, as compared with intrastate trucks, because the interstate trucks traveled fewer miles. As indicated hereinabove, appellants' tax operates similarly in that full taxes are assessed for the brief period in which appellee's oil passes through the taxing jurisdiction. *Scheiner* stands for the proposition that the requirement of fair apportionment is expressed in the tests of internal and external consistency. Thus, since the tax here is on the full value of appellee's oil and is not apportioned at all, it discriminates against the foreign commerce concerned here.

In *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 81-3, 68 S.Ct. 1475, 1475-76, 92 L.Ed. 1832 (1948), petitioner asserted that a franchise tax on capital used within the state solely for interstate business violated the Commerce Clause. The tax was *not on the gas* that passed through petitioner's pipelines *but on*

property and operations in the state. The Court found that the tax was not on commerce itself and there was no possibility of multiple taxation and upheld the tax.

Underlying all these cases, indeed all the cases on the Commerce Clause (and the Import-Export Clause), is the very principle upon which the instant case turns. That is, that *goods in transit* from a foreign source may not be taxed. If this were not true, the distinctions and discussions in these cases would be superfluous because all goods would be subject to any tax as soon as they cross into the taxing state. No inquiry beyond whether the goods had crossed the state line would be necessary. In each of these cases, however, the inquiry goes far beyond this basic question. This additional inquiry is necessary because goods initially in transit remain in transit until they reach their actual predetermined and intended destination.

The test or standard for review in the instant case involves ad valorem taxes on foreign commerce, and is set forth in *Japan Line Ltd v. Los Angeles County*, as follows:

> [W]e believe that an inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than of interstate, commerce. In addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second, whether the tax prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments." If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

Id., 441 U.S. at 451, 99 S.Ct. at 1823.

This test affects foreign commerce. It is applied because "[w]hen construing Congress' power to regulate Commerce with foreign Nations," a more extensive Constitutional inquiry is required. This more extensive inquiry encompasses the *Complete*

Auto test plus the "two additional considerations" set out in *Japan Line*. The tax concerned in this case, however, is not permissible under either the *Complete Auto* test or these additional considerations.

The first of the additional considerations articulated in *Japan Line* is "the enhanced risk of multiple taxation." *Id.*, 441 U.S. at 446, 99 S.Ct. at 1820. In the context of interstate commerce, the requirement of apportionment and the corollary preclusion of taxation of all the property prevents multiple taxation. In the context of foreign commerce, full and proper apportionment cannot be ensured. Thus, even if state taxes are "fairly apportioned," multiple taxation on foreign commerce on "more than one full value" may still result in a "risk of double tax burden to which commerce is not exposed, and which the commerce clause forbids." *Id.*, 441 U.S. at 447-48, 99 S.Ct. at 1820-21. "[A] slight overlapping of tax--a problem that might be deemed *de minimis* in a domestic context--assumes greater importance in the context of foreign commerce." *Id.*, 441 U.S. at 456, 99 S.Ct. at 1825.

The second of the additional considerations beyond the *Complete Auto* test as set out in *Japan Lines* is that the state tax "may impair federal uniformity in an area where uniformity is essential." *Id.*, 441 U.S. at 448, 99 S.Ct. at 1821. While the constitutional grant to Congress by the Commerce Clause of power to regulate commerce between the states and foreign nations is made in parallel phrases, there is evidence that the intended scope of the foreign commerce power is to be the greater. A state tax may impair this greater power and frustrate achievement of federal uniformity. *Id.*, 441 U.S. at 449, 99 S.Ct. at 1822. For instance, where states impose apportioned taxes, international disputes over reconciling apportionment formulas may arise.

The "operating incident" of the tax herein is the mere presence of the oil in the taxing jurisdiction: the oil's transit through Nueces County. The oil is there temporarily, in the Harbor Island facility, which is sought to be fully taxed with the use of

the facility for temporary oil storage (services) factored into the tax.

I would hold that the lack of a sufficient nexus of the oil with the Appraisal District, the failure of the tax to pass the test set out in *Complete Auto*, and the failure to meet the requirements of "additional considerations" required by *Japan Line*, causes the tax in question to be in violation of the Commerce Clause of the United States Constitution, and, therefore, it is impermissible. Moreover, if appellant's tax did not violate the Import-Export Clause, it would violate the Foreign Commerce Clause by preventing the United States from "speaking with one voice" with respect to the taxation of foreign goods while they were in international commerce.

I would affirm the judgment of the trial court.

NO. 89-3953-B

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY	§	IN THE DISTRICT COURT
	§	117TH JUDICIAL DISTRICT
V.	§	
NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTY APPRAISAL DISTRICT	§	NUECES COUNTY, TEXAS

NO. 89-4334-E

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY	§	IN THE DISTRICT COURT
	§	148TH JUDICIAL DISTRICT
V.	§	
NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTY APPRAISAL DISTRICT	§	NUECES COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-captioned causes, having been duly consolidated, came on for trial on April 11, 1991 before the Court without a jury and in which trial the only evidence presented was that in the Agreed Stipulation of Facts and the Second Agreed Stipulation of Facts. All parties and their attorneys were present. After

considering the pleadings, the evidence and the arguments of counsel, the Court rendered judgment in favor of Plaintiff, such judgment having been signed on April 25, 1991. In response to a request by Defendants herein, and over the objection of Plaintiff that such findings and conclusions are not warranted and need not be filed, the Court hereby makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. On January 1 of 1988, 1989 and 1990, respectively, 323,019, 658,968 and 408,667 barrels of crude oil, owned by Plaintiff, were in the Harbor Island Storage facility, which is owned by an entity unrelated to Plaintiff, American Petrofina, and is located in the Nueces County Appraisal District.

2. This crude oil originated totally from foreign sources and was transported by ships through the Gulf of Mexico to the Harbor Island Storage facility where it was temporarily held as part of and incident to the transportation of that crude oil to its ultimate destination which is outside the Nueces County Appraisal District.

3. The temporary presence of this crude oil in the Nueces County Appraisal District was reasonably necessary for the accommodation of the transportation of this crude oil to its ultimate, predetermined destination, the Plaintiff's refinery located in Three Rivers, Live Oak County, Texas, which transportation was accomplished from the Harbor Island facility through 36.2 miles of pipeline owned by American Petrofina to Refugio, Refugio County, Texas, and from there through 65 miles of pipeline owned by Plaintiff to Plaintiff's refinery.

4. No manufacturing, assembly, servicing, processing, commingling with other oil from other sources, or refining of any kind was performed on this crude oil while it was located within the Nueces County Appraisal District awaiting its accommodation of transportation to its ultimate destination.

CONCLUSIONS OF LAW

1. Plaintiff has complied with all prerequisites for filing and maintaining the instant lawsuits, and this Court has jurisdiction to hear and decide these cases.

2. The crude oil, which is the subject of this suit, is not subject to ad valorem taxation in Nueces County, Texas for tax years 1988, 1989 and 1990 because such taxation is precluded by the Commerce Clause of the United States Constitution.

3. The crude oil, which is the subject of this suit, is not subject to ad valorem taxation in Nueces County, Texas for tax years 1988, 1989 and 1990 because such taxation is precluded by the Import/Export Clause of the United States Constitution.

4. The crude oil which is the subject of this suit, as described by Nueces County Appraisal District account numbers ID-49-0251-0110 and ID-1906000-110, is exempt from taxation by Defendants and, accordingly, the property should be removed from the Defendants' appraisal rolls for the tax years 1988, 1989 and 1990.

SIGNED this 16th day of May, 1991.

/s/ Vernon Harville
JUDGE PRESIDING

NUECES COUNTY TAX APPRAISAL DISTRICT
APPRAISAL REVIEW BOARD

Order Determining Protest

Cause No. 32 Acct No. ID-1906000-110

The notice of Diamond Shamrock R&M protesting the action of the Nueces County Appraisal District set forth therein, being timely filed, was presented for hearing on 6/27, 1989.

The board timely delivered written notice of the hearing date, time, and place to the protesting property owner. The property owner and chief appraiser were given the opportunity to testify, present evidence and present testimony. After reviewing the Notice of Protest and after hearing the testimony and evidence presented, the Board has determined with a quorum present that the appraisal records are:

Option A - Incorrect in the following manner.

(Option B -) Correct as to the errors alleged in the Notice of Protest.

NATURE OF PROTEST:

☐ 1. Value on property above market value of property

☐ 2. Value on property excessive in comparison with other similar property

☐ 3. Property denied total exemption

☐ 4. Property denied partial exemption (homestead, disabled veteran)

☐ 5. Failure to be granted ag-use, open-space, timber-use, or other special land valuation

☐ 6. Improper situs - ownership in wrong taxing unit

☐ 7. Wrongful determination of ownership

☐ 8. Other _____

It is therefore ORDERED that: Option A:

The Chief Appraiser of the Nueces County Appraisal District correct the appraisal records in the following manner to conform the records to the requirements of law:

Value Change: From _____ To _____

Other: Value-11,235,400

(Option B:)

Protest be denied and the applicable appraisal records not be changed.

Signed on July 27, 1989.

/s/ Drue J. Combs
Appraisal Review Board
Chairman

NUECES COUNTY TAX APPRAISAL DISTRICT

* * * ORDER DETERMINING PROTEST * * *

17 AUG 1990

APPEAL #: 90000333

ACCOUNT #: ID-1906000-110

DIAMOND SHAMROCK R&M
P.O. BOX 696000
SAN ANTONIO, TX 78269

LEGAL: CRUDE INV AT HARBOR ISLAND

The Notice of Protest of DIAMOND SHAMROCK R&M protesting the action of the Nueces County Appraisal District set forth therein, being timely filed, was presented for hearing on 06/11/90.

The board timely delivered written notice of the hearing date, time, and place to the protesting property owner. The property owner and Chief Appraiser were given the opportunity to testify, present evidence and present testimony. After reviewing the Notice of Protest and after hearing the testimony and evidence presented, the Board has determined with a quorum present that the appraisal records are correct.

It is therefore ORDERED that the Protest be denied and the applicable appraisal records not be changed.

Signed on this 31st day of August, 1990.

/s/ Drue J. Combs
Appraisal Review Board
Chairman

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

June 15, 1994

Mr. Edward Kliewer, III
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Mr. Peter W. Low
Calame Linebarger Graham &
Pena
P.O. Box 17428
1949 south I.H. 35
Austin, TX 78760

RE: Case No. D-3982

Style: DIAMOND SHAMROCK REFINING AND MARKETING COMPANY v. NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTY APPRAISAL DISTRICT

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Respectfully yours,

John T. Adams, Clerk

By /s/ Mia Zierlein
Mia Zierlein, Deputy Clerk

OFFICIAL NOTICE
COURT OF APPEALS
13th SUPREME JUDICIAL DISTRICT

May 27, 1993

RE: Case No. 13-91-00308-CV

Style: Nueces County Appraisal District and the Appraisal District v. Diamond Shamrock Refining and Marketing Company

The appellee's motion for rehearing in the above cause was this day OVERRULED.

T.C. Case #89-3953-B
13th Court of Appeals
10th Floor
Nueces County Courthouse
Corpus Christi, Texas 78401

CATHY WILBORN, CLERK
Kenneth Malone
Foster, Lewis, Langley,
Gardner & B
1100 NBC Bank Plaza
112 East Pecan Street
San Antonio, TX 78205-1533

THE STATE OF TEXAS

To the District Court of Nueces County, Greetings:

Before our Supreme Court on the 20th day of April A.D. 1994, the Cause, upon writ of error, to revise or reverse your Judgment between

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY	vs.	**NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTY APPRAISAL DISTRICT**

No. **D-3982** in the Supreme Court of Texas

No. **89-3953-B** in the **117th** District Court of **Nueces** County, Texas, was determined; and therein our said Supreme Court entered its judgment or order in these words:

"THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the Thirteenth District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be affirmed.

"IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The judgment of the court of appeals is affirmed;

2) Nueces County Appraisal District and the Appraisal Review Board of the Nueces County Appraisal District shall recover from Diamond Shamrock Refining and Marketing Company, which shall pay, the costs in this Court and in the court of appeals.

"A copy of this judgment and of the Court's opinion is certified to the court of appeals and to the District Court of Nueces County, Texas, for observance."

Wherefore we command you to observe the order of our said Supreme Court in this behalf, and in all things to have recognized, obeyed, and executed.

Witness the Honorable **Thomas R. Phillips**, Chief Justice of our said

Supreme Court, with the seal thereof annexed, at the City of Austin, this the 3rd day of August A.D. 1994

JOHN T. ADAMS, Clerk

By/s/ Courtland Crocker
Courtland Crocker, Deputy

NO. 89-3953-B

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY	§	IN THE DISTRICT COURT
	§	
	§	117TH JUDICIAL
	§	DISTRICT
V.	§	
	§	
NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTY APPRAISAL DISTRICT	§	
	§	
	§	
	§	
	§	
	§	NUECES COUNTY,
	§	TEXAS

NO. 89-4334-E

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY	§	IN THE DISTRICT COURT
	§	
	§	148TH JUDICIAL
	§	DISTRICT
V.	§	
	§	
NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTY APPRAISAL DISTRICT	§	
	§	
	§	
	§	
	§	
	§	NUECES COUNTY,
	§	TEXAS

FINAL JUDGMENT

On the 11th day of April, 1991, came on to be heard the above-entitled and numbered cause and DIAMOND SHAMROCK REFINING AND MARKETING COMPANY, Plaintiff, appeared by and through its corporate representative and by attorney of record and announced ready for trial, and NUECES COUNTY

APPRAISAL DISTRICT AND THE NUECES COUNTY APPRAISAL REVIEW BOARD OF THE NUECES COUNTY APPRAISAL DISTRICT, Defendants, appeared by attorney of record and announced ready for trial, and no jury having been demanded, all matters of fact and things in controversy were submitted to the Court and the case proceeded to trial.

The Court, having reviewed the parties' Agreed Stipulations Of Facts filed pursuant to Rule 263 of the Texas Rules of Civil Procedure and hearing the argument of counsel, is of the opinion that the property which is the subject of this suit, as described by Nueces County Appraisal District Account Numbers ID-49-0251-0110 and ID-1906000-110, is exempt from taxation by Defendants for the tax years in question and that, accordingly, the property should be removed from the Defendants' Appraisal Rolls for the tax years 1988, 1989 and 1990. It is, therefore,

ORDERED, ADJUDGED and DECREED by the Court that the property which is the subject of this suit, as described by Nueces County District Account Numbers ID-49-0251-0110 and ID-1906000-110, is exempt from ad valorem taxation by Defendants for the ad valorem tax years 1988, 1989 and 1990 and should be deleted by the Defendants from the applicable Appraisal Rolls for the ad valorem years 1988, 1989 and 1990. It is further

ORDERED, ADJUDGED and DECREED that the Chief Appraiser of Defendant, NUECES COUNTY APPRAISAL DISTRICT, shall perform the following administrative procedures:

(i) within thirty (30) days after this Final Judgment is signed by the Court, he shall deliver or cause to be delivered a copy of this Final Judgment to the Assessor for each taxing unit affected by any correction required in (ii) below; and

(ii) with proper diligence and within a reasonable period of time after this Final Judgment is signed by the Court, he shall (a) correct or cause to be corrected the Appraisal Rolls or other appropriate appraisal records of Defendant,

NUECES COUNTY APPRAISAL DISTRICT, for the 1988, 1989 and 1990 ad valorem tax years to reflect this final determination of the Plaintiff's appeal, including, without limitation, correcting or causing to be corrected the Appraisal Rolls and other appropriate records of Defendant, NUECES COUNTY APPRAISAL DISTRICT, for the 1988, 1989 and 1990 ad valorem tax years to reflect the deletion of the Plaintiff's property which is the subject of this suit, as described by Nueces Appraisal District Account Numbers ID-49-0251-0110 and ID-1906000-110, from the Appraisal Rolls and (b) certify such corrections to the assessor for each taxing unit affected by such corrections. It is further

ORDERED, ADJUDGED and DECREED that all costs are assessed against the Defendants. It is further

ORDERED, ADJUDGED and DECREED that all relief not expressly granted in this Final Judgment is DENIED.

SIGNED this 25th day of April, 1991.

/s/ Vernon Harville
JUDGE PRESIDING

APPROVED AS TO FORM:

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FAX:(512) 226-1065

BY /s/ Edward Kliewer, III
EDWARD KLIEWER, III
State Bar No. 21865500

ATTORNEYS FOR PLAINTIFF
DIAMOND SRAMROCK REFINING AND
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BY /s/ Russell Graham
RUSSELL GRAHAM
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ATTORNEYS FOR DEFENDANTS
NUECES COUNTY APPRAISAL DISTRICT
AND THE APPRAISAL REVIEW BOARD OF
THE NUECES COUNTY APPRAISAL DISTRICT

[Filed April 11, 1991]

No. 89-3953-B

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY	§	IN THE DISTRICT COURT
V.	§	117TH JUDICIAL DISTRICT
NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTRY APPRAISAL DISTRICT	§	NUECES COUNTY, TEXAS

No. 89-4334-E

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY	§	IN THE DISTRICT COURT
V.	§	148TH JUDICIAL DISTRICT
NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTRY APPRAISAL DISTRICT	§	NUECES COUNTY, TEXAS

AGREED STIPULATION OF FACTS

NOW COME Plaintiff, Diamond Shamrock Refining and Marketing Company, and Defendants, Nueces County Appraisal District and the Appraisal Review Board of the Nueces County Appraisal District, and file this their Agreed Stipulation of Facts pursuant to Rule 263, Texas Rules of Civil Procedure, by which the above-named parties stipulate and agree that the following

facts are true, correct, and established for all purposes relevant to the resolution of the above style causes of action.

I

These cases are ad valorem tax cases brought by Plaintiff pursuant to Chapter 42 of the Texas Property Tax Code challenging the inclusion of certain of Plaintiff's property on the Defendants' appraisal rolls for tax years 1988, 1989 and 1990. Plaintiff protested the inclusion of its property on such appraisal rolls to Defendant, the Appraisal Review Board, pursuant to Chapter 41 of the Texas Property Tax Code on the ground that such property was not subject to ad valorem taxation in Texas for tax years 1988, 1989 and 1990, because such taxation is precluded by the Commerce Clause and the Import/Export Clause of the United States Constitution. Plaintiff did not protest the situs in Texas at which the property is taxed, nor its market value, and neither is at issue in these cases. Plaintiff admits for purposes of this litigation that taxation of the property for tax years 1988, 1989 and 1990 is in all respects valid except to the extent that its taxation may be precluded by the Commerce Clause or by the Import/Export Clause of the United States Constitution.

II

Plaintiff has complied with all prerequisites for filing and maintaining the instant lawsuits and this Court has jurisdiction to hear and decide these cases.

III

The property at issue consists of crude oil located within the Defendants' appraisal jurisdiction as of January 1, 1988, January 1, 1989 or January 1, 1990, and which bears Nueces County Appraisal District account number ID 49-0251-0110.

IV

The crude oil at issue originates totally from foreign sources, and is transmitted by ships through the Gulf of Mexico to the Harbor Island storage facility located within the Nueces County

Appraisal District as part of and incident to the transportation of the crude oil to its ultimate destination outside of the Nueces County Appraisal District. The presence of the crude oil within the Nueces County Appraisal District, while in transit to its ultimate destination, is reasonably necessary for the accommodation of the transportation of the crude oil into two (2) pipelines owned by American Petrofina which transport the crude oil 36.2 miles to a metering station in Refugio, Texas, from which it is pumped 65 miles in a pipeline owned by Plaintiff to its ultimate predetermined destination, the Plaintiff's refinery located in Three Rivers, Texas. Plaintiff does not divert the oil to any other facility other than the Three Rivers refinery.

V

No manufacturing, assembly, servicing, processing, commingling with other oil from other sources, or refining of any kind is performed on the subject crude oil while located within the Nueces County Appraisal District, while the crude oil is awaiting its accommodation of transportation to its ultimate destination.

VI

There were 323,019 barrels of the crude oil present in the Harbor Island facility on January 1, 1988. The longest any of this oil spent in that facility was 12 days. There were 658,968 barrels of the crude oil present in the Harbor Island facility on January 1, 1989. The longest any of this oil spent in that facility was 25.3 days. There were 408,667 barrels of the crude oil present in the Harbor Island facility on January 1, 1990. The longest any of this oil spent in that facility was 18.1 days.

VII

At all times during the years 1987 through 1990, crude oil owned by Plaintiffs was present in the facilities at Harbor Island owned by American Petrofina and was moving in the manner described in Paragraph IV above.

VIII

None of the crude oil in question is pumped or sold outside the state of Texas in its present form.

IX

There are governmental services provided to the Harbor Island facility at Nueces County, Texas, and to the crude oil located at such facility. In 1988, the owner of the Harbor Island storage facility paid One Hundred Twenty-nine Thousand Six Hundred Seventy-nine and 70/100 Dollars ($129,679.70) in ad valorem taxes, in 1989 paid One Hundred Thirty-three Thousand Two Hundred Six and 53/100 Dollars ($133,206.53) in ad valorem taxes and in 1990 paid One Hundred Forty Thousand Nine Hundred Three and 17/100 Dollars ($140,903.17) in ad valorem taxes. Taxes due, if any, on crude oil located at she facility will be dependent upon the outcome of the instant cause of action.

Respectfully submitted,

FOSTER, LEWIS, LANGLEY,
GARDNER &
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112 East Pecan
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By: /s/ Edward Kliewer III
EDWARD KLIEWER III
State Bar No. 11570500
HARRY W. WOLFF, JR.
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(512) 447-6675

By: /s/ Russell Graham
RUSSELL GRAHAM
State Bar No. 08274500

ATTORNEYS FOR DEFENDANTS

The Foregoing Agreed Stipulations of Facts are Hereby Signed and Certified Correct Pursuant to Texas Rule of Civil Procedure 263

_____
JUDGE PRESIDING

[Filed April 11, 1991]

No. 89-3953-B

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY	§	IN THE DISTRICT COURT
V.	§	117TH JUDICIAL DISTRICT
NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTRY APPRAISAL DISTRICT	§	NUECES COUNTY, TEXAS

No. 89-4334-E

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY	§	IN THE DISTRICT COURT
V.	§	148TH JUDICIAL DISTRICT
NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTRY APPRAISAL DISTRICT	§	NUECES COUNTY, TEXAS

SECOND AGREED STIPULATION OF FACTS

NOW COME Plaintiff, Diamond Shamrock Refining and Marketing Company, and Defendants, Nueces County Appraisal District and the Appraisal Review Board of the Nueces County Appraisal District, and file this their Second Agreed Stipulation of Facts pursuant to Rule 263, Texas Rules of Civil Procedure, by which the above-named parties stipulate and agree that the

following facts are true, correct, and established for all purposes relevant to the resolution of the above-styled causes of action.

I

Plaintiff is a corporation authorized to do business in the State of Texas.

II

Plaintiff's refinery located at Three Rivers, Texas refines crude oil at an average daily rate of 50,000 barrels. Plaintiff has storage tanks at its Three Rivers refinery capable of holding 200,000 barrels of crude oil. Plaintiff attempts to maintain to the extent possible 200,000 barrels of crude oil in storage at the Three Rivers refinery at all times.

III

If the crude oil in dispute in this cause of action had originated from sources within the State of Texas it would be subject to ad valorem taxation in this State. The Nueces County Appraisal District attempts to appraise for ad valorem taxation all other crude oil located within its boundaries on January 1, of each year.

IV

The Harbor Island facility is not located in a free trade zone nor is it a bonded customs storage facility.

Respectfully submitted,

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P.O. Box 17428
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Telefax No. (512) 443-3494

By: /s/ Russell Graham
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ATTORNEYS FOR PLAINTIFF

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By: /s/ Edward Kliewer III
EDWARD KLIEWER III
State Bar No. 11570500
HARRY W. WOLFF, JR.
State Bar No. 21865500

ATTORNEYS FOR DEFENDANTS

The Foregoing Agreed Stipulations
of Facts are Hereby
Signed and Certified Correct
Pursuant to Texas Rule of Civil
Procedure 263

_____
JUDGE PRESIDING

[TRANSCRIPT EXCERPTS]

No. 89-3953-B

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY	§	IN THE DISTRICT COURT
V.	§	117TH JUDICIAL DISTRICT
NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTRY APPRAISAL DISTRICT	§	NUECES COUNTY, TEXAS

HEARING ON APRIL 11, 1991

* * * *

[p. 6]

MR. KLIEWER: Your Honor, this is an ad valorem tax case, and what it involves is the question of whether or not the Nueces County Appraisal District has the authority to place on its appraisal roll crude oil owned by Diamond Shamrock for the years 1988, 1989 and 1990. This is crude oil that arrives from the North Sea, and is then put in tanks on Harbor Island, owned by American Petrofina, and, ultimately, piped up to the Three Rivers Refinery, owned by Diamond Shamrock in Live Oak County.

And it's the position of the Plaintiff that this crude oil is protected by both the Import-Export Clause and the Commerce Clause of the United States Constitution and is, therefore, exempt from taxation. Obviously the Appraisal District has taken the opposite position and has place this crude oil on the appraisal rolls for the years in question. So, the issue before this Court is: Whether or not this oil is, in fact, as we believe, protected from property taxation by the Constitution of the United States.

* * * *

[p. 48]

* * * *

THE COURT: Gentlemen, I can understand why I was asked to hear this case.

I studied your briefs, your pleadings. And most of the cases -- I'm inclined to grant the *MICHELIN* case is in favor of the Plaintiff rather than the Defendant.

The Court finds that the point of origin of this oil was in the North Sea, which is a foreign source. The point of final destination was the refinery at Three Rivers, Live Oak County, Texas. The Court finds that the oil did not lose its status as "import" until it reached its final place of destination. It is qualified as "exempt property" under the Commerce Code and the Import-Export Clause.

[p. 49]

Therefore, the Court finds in favor of the Plaintiff.

I hope that -- I'm sure it will. We'll let the Supreme Court have the final say in this. This is an important case.

* * * *

(2)

FILED
OCT 13 1994
OFFICE OF THE CLERK

No. 94-466

In The

Supreme Court of the United States

October Term, 1994

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY,

Petitioner,

vs.

NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTY APPRAISAL DISTRICT,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

RESPONDENTS' BRIEF IN OPPOSITION

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5770
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

BEST AVAILABLE COPY

30 pp

QUESTIONS PRESENTED

1. Whether the Import-Export Clause prohibits the imposition of *ad valorem* property taxes on imported goods merely because they are in transit within their state of destination?

2. Whether the Commerce Clause prohibits the imposition of *ad valorem* property taxes on imported goods merely because they are in transit within their state of destination?

LIST OF PARTIES

Petitioners:

Respondents adopt Petitioner's listing pursuant to this Court's Rule 29.1.

Respondents:

Respondent Nueces County Appraisal District is a political subdivision of the State of Texas. Respondent Appraisal Review Board of the Nueces County Appraisal District is an appointed board responsible for determining administrative appeals related to the District's actions.

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No. 94-466

In The

Supreme Court of the United States

October Term, 1994

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY,

Petitioner,

vs.

NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTY APPRAISAL DISTRICT,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Nueces County Appraisal District and the Appraisal Review Board of the Nueces County Appraisal District, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, Diamond Shamrock Refining and Marketing Company.

OPINIONS BELOW

The "Opinions Below" section of the Petition for Writ of Certiorari accurately summarizes the lower court proceedings.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 8 of the United States Constitution provides in pertinent part as follows:

> The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

Article I, § 10, cl. 2 of the United States Constitution provides as follows:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

STATEMENT OF THE CASE

This case presents another instance of a taxpayer seeking to avoid the payment of just taxes by trying to cloak itself within the protections afforded to interstate and international commerce by the Import-Export Clause and the Commerce Clause of the United States Constitution.

This cause arose under the provisions of the Texas Property Tax Code (hereinafter referred to as the Tax Code or the Code).[1] The Respondents are the Nueces County Appraisal District, which has the responsibility under the provisions of the Tax Code for the development of appraisal rolls containing a description and valuation of all properties within the District's boundaries subject to property taxation, and the Appraisal Review Board of the Nueces County Appraisal District which is, under the provisions of Chapter 41, Tax Code, responsible for determining protests filed by property owners related to the appraisal of their property. Petitioner brought this cause as a petition for review under the provisions of Chapter 42 of the Code. Petitioner sought judicial review of the action of the Respondents in determining that certain crude oil owned by Petitioner and located within the Respondents' boundaries on January 1 of 1988, 1989 and 1990 was taxable.

Petitioner imports crude oil which originates from foreign sources and is transported by ships to the Harbor Island storage facility owned by American Petrofina and located within the Respondents' boundaries (App. 57a-58a).[2] From Nueces County the oil is transported by pipeline to its ultimate destination which is Petitioner's refinery in Three Rivers, Texas (App. 58a).

There were 323,019 barrels of the crude oil present in the Harbor Island facility on January 1, 1988. The longest any of this oil spent in that facility was 12 days. There were 658,968 barrels of the crude oil present in the Harbor Island facility on January 1, 1989. The longest any of this oil spent in that facility was 25.3 days. There were 408,667 barrels of the crude oil present in the Harbor Island facility on January 1, 1990. The longest any of this oil spent in that facility was 18.1 days (App. 58a).

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1. Title 1, Tex. Tax Code Ann. (West Supp. 1994).

2. All Appendix references are to the Appendix attached to the Petition.

While the disputed property is the crude oil that was present at Harbor Island on January 1 of 1988, 1989 and 1990, crude oil owned by the Petitioner was continuously present at the Harbor Island facility during the years 1987 through 1990 (App. 58a).

None of Petitioner's crude oil was pumped or sold outside the State of Texas (App. 59a). While the crude oil was located within Respondents' boundaries it was provided with governmental services (App. 59a).

The Petition, on Page 3, asserts several facts that are not reflected in the record of this cause, such as "The tankers used to import crude oil into this country have massive cargo holds, on the order of magnitude of one or two million barrels. Pipelines such as American Petrofina's simply do not have the capacity to transport such volumes of oil all at once." While Respondents do not contest these facts, they directly dispute the conclusion that Petitioner draws from them that "As a consequence, unlike domestic crude oil, which is transported to the refinery as it is pumped out of the ground, imported crude oil must be stored temporarily at its port of entry until it can be pumped to the refinery." This statement is not only unsupported by the evidence in the record of this cause, it is just plain wrong. Domestic crude oil is regularly gathered into tank farms before being shipped by pipelines to a refinery. *See Exxon Corp. v. San Patricio County Appraisal District,* 822 S.W. 2d 269 (Tex. App. — Corpus Christi 1991, *writ denied*), involving domestic oil. Petitioner's statement that there is some significant difference in the method of transporting domestic versus foreign crude oil is incorrect. Any barrel of crude oil located in tankage within Texas is for all practical purposes indistinguishable from any other barrel. All are destined to be refined and both domestic and foreign crude oil often flow through the exact same tank farms and pipelines.

The cause was tried before the court, without a jury, on

stipulated facts on April 11, 1991. Judgment for Diamond Shamrock was entered on April 25, 1991 (App. 52a-55a). The Corpus Christi Court of Appeals, sitting *en banc*, reversed the trial court's judgment and rendered judgment that the property was taxable in a 4-3 decision (App. 14a-41a). The majority found that because the taxes in question did not discriminate against foreign commerce on their face and that because the oil's destination was within the State of Texas, the taxes did not, and could not, offend any of the purposes of the Import-Export Clause identified by this Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) (App. 16a-20a). The majority also declared that it was irrelevant whether the goods were in transit through Nueces County at the time they were appraised. Although the majority recognized that the fact that oil was in transit at the time of appraisal would have been relevant under traditional Import-Export Clause analysis, in its estimination, after *Michelin* "the concept of 'in transit' loses any rational meaning" independent of the purposes of the Clause. Accordingly, the majority asserted that once those purposes are satisfied, "the taxability of the property becomes a matter for the state." (App. 20a). For similar reasons, the majority rejected Petitioner's Commerce Clause challenge. One judge concurred separately.

Three judges dissented. The dissent found no basis for restricting the application of the in-transit rule of the Import-Export Clause and the Commerce Clause to goods that have not yet reached their state of destination. In focusing on whether goods are in transit, they observed, this Court's concern has not been where goods come to rest but rather whether they are in the midst of a commercial journey that originated outside the state in which they were taxed (App. 28a).

On review the Texas Supreme Court affirmed. That court held that the Import-Export Clause was not violated by the taxes imposed upon Petitioner's oil. It did so even though it

acknowledged that the oil was " 'in transit' while in Nueces County." (App. 6a). The Texas Supreme Court also acknowledged that in *Michelin* this Court stated that the Import-Export Clause prohibits " 'the assessment of even non-discriminatory property taxes on goods which are merely in transit through the State when the tax is assessed.' " (App. 5a [quoting *Michelin,* 423 U.S. at 290]). Nevertheless, the state court upheld the taxes assessed by Nueces County on the ground that the in-transit exception announced in *Michelin* did not apply to goods that enter the country through their state of destination.

The Texas Supreme Court reached this conclusion on the basis of its reading of the purposes of the Import-Export Clause. According to the Texas court, one purpose of the Clause was to prevent states with ports of entry " 'from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the inland States not situated as favorably geographically.' " (App. 4a [quoting *Michelin,* 423 U.S. at 285-86]). The taxes imposed upon Petitioner did not, in the Court's view, pose such a threat because "the oil in question here entered *only* the State of Texas and . . . never left Texas in its crude oil form." (App. 6a [emphasis in original]). Thus, according to the Texas court, when read in context, "the *Michelin* Court's qualification clearly applies only to goods in transit through the state *to or from another state* and not to goods merely in transit within the only state the goods ever enter." (App. 6a [emphasis in original]).

The Texas Supreme Court also rejected Petitioner's Commerce Clause challenge, finding that the oil in dispute, though technically in transit through Nueces County, (1) was part of a continuous presence of a large quantity of Petitioner's oil in the County and (2) that the oil received governmental services while in the County; and, therefore, had a sufficient nexus with the County to justify taxation under the Commerce Clause (App. 10a-12a). The court noted many decisions of this Court invalidating state and

local taxation of goods in transit, but distinguished them on the ground that they involved not "foreign goods 'in transit' through only one state, which remain in that state," but "goods 'in transit' through one State on the way to or from another State or on the way to a foreign country." (App. 9a-10a nn. 6-7 [citations omitted]). The Texas court also asserted that after this Court's decision in *D.H. Holmes Co. v. McNamara,* 486 U.S. 24 (1988), "whether Diamond Shamrock's 'in transit' argument has any remaining validity under the modern Commerce Clause analysis is questionable." (App. 10a n.7).

REASONS FOR DENYING THE WRIT

The decision below was limited to the narrow facts of this case[3] and on the basis of those facts it is clear that tax imposed on Petitioner's property violated none of the purposes of the Import-Export Clause or the Commerce Clause of the United States Constitution.

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3. The Texas Supreme Court limited its holding as follows:

> Under these facts, we do not resolve a number of significant questions. For instance, we do not decide whether oil passing through Texas on its way to a foreign country or to another State is taxable under the Import-Export Clause or the Commerce Clause. Nor do we decide whether oil arriving in Texas from another State is taxable. Rather, the only question presented is whether oil that enters Texas from a foreign country and reaches its ultimate destination here may, under the United States Constitution, be taxed in a particular Texas county, despite the fact that it is still "in transit" while there.

App. 3a.

I.

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OF THE FIFTH CIRCUIT UNDER THE IMPORT-EXPORT CLAUSE.

A. The Decision Below Is Consistent With The Decisions Of This Court Under The Import-Export Clause.

The Import-Export Clause is Article I, § 10, cl. 2 of the United States Constitution and reads as follows:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

Petitioner's position, simply stated, is that the oil cannot be taxed because it is still in movement between its point of origin (foreign) and its final destination (Three Rivers, Texas). Respondents, on the other hand, would urge that the real issue is not whether the oil is in movement between its origin and its destination but whether it is "in transit" as that term has been defined by this Court in the context of the immunity from taxation afforded by the Import-Export Clause.

What Petitioner seeks to do is harken back to the traditional analysis used by this Court prior to abandoning that analysis in *Michelin Tire Corp. v. Wages, supra.*

While it is true that even this Court misunderstood for one hundred years the intentions of the Framers when they incorporated the Import-Export Clause into the United States Constitution [*see Low v. Austin*, 80 U.S. 29 (1872)], that misunderstanding was remedied when the Court handed down its opinion in *Michelin*. In that case, this Court went into great detail in discussing the real reasons for the inclusion of the Import-Export Clause in the United States Constitution. Those reasons were summarized by this Court as follows:

> The Framers of the Constitution thus sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the inland States not situated as favorably geographically.

At 285-286.

This Court then proceeded into a detailed analysis of the first two reasons for the Import-Export Clause and indicated why non-discriminatory property taxation would in no way conflict with the

first two purposes of the Clause (at 286-288). The only issue in the instant cause is whether the taxes in question conflict with the third purpose of the Clause.

Since Petitioner's claim for immunity from taxation is based solely on the fact that the imported oil has not reached its final destination, the refinery in Three Rivers, Texas, this Court's holding in *Michelin* with regard to the third purpose of the Import-Export Clause is of paramount importance to this cause. In that regard this Court held as follows:

> Finally, nondiscriminatory ad volorem property taxes do not interfere with the free flow of imported goods among the States, as did the exactions by States under the Articles of Confederation directed solely at imported goods.
>
> * * *
>
> To be sure, allowance of nondiscriminatory ad volorem property taxation may increase the cost of goods purchased by "inland" consumers. But as already noted, such taxation is the quid pro quo for benefits actually conferred by the taxing State. There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods. An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation

> of certain States that enabled them to single out goods destined for other States. *In effect, the Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State.* A nondiscriminatory ad valorem property tax obviously stands on a different footing, and to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed.

At 289-290. (Emphasis added).

With respect to Petitioner's property located within the Respondents' boundaries, it is stipulated that it receives services from local governments (App. 59a). It is also stipulated that property of this type owned by Petitioner is continuously present within the Respondents' boundaries (App. 58a). It is stipulated that had the oil in question originated in Texas it would be taxable (App. 62a). Finally, it is stipulated that none of the oil is destined to a location outside of Texas (App. 59a). With these stipulations in mind, it is easy to see that what Petitioner seeks is not protection from the evils that the Import-Export Clause was designed to prevent but rather preferential treatment not available to other similarly situated taxpayers.

Respondents would urge that the third purpose of the Clause was to serve as a shield to inland states and their citizens and was never intended to protect importers from bearing their fair share of the cost of government. In the instant cause, the Respondents would ask Petitioner which inland state and its citizens are being denied their shield? The answer obviously is — none.

Petitioner's oil is not "merely in transit through" Texas, but rather it is continuously present, receiving governmental services, and will be consumed within the State. What Petitioner seeks to do is transform the shield designed to protect others into a sword to be used to protect its private interests. Petitioner's property is continuously present within Respondents' boundaries and receives governmental services there but Petitioner seeks to use this sword to hold the State of Texas and its political subdivisions at bay when compensation for those services is sought. What Petitioner seeks is an exemption for up to seventy-five percent (75%)[4] of the oil it owns in Texas, and intends to use in Texas, on the basis of the provisions of the Import-Export Clause when the protections meant to be offered by that Clause are in no way offended by the tax.

Petitioner justifies this position by citing cases which are easily distinguished on their facts or their era.

What the Supreme Court accomplished in *Michelin,* though a dramatic shift with regard to the taxation of imports, was but one of a continuing series of steps toward a more rational review of state taxation as it relates to the Import-Export Clause.

Shortly after *Michelin,* this Court went one step further and allowed a tax upon gross proceeds derived from foreign commerce, as distinguished from interstate commerce. *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978). In this case too the Court overruled prior decisions which had held against such taxes. *Puget Sound Stevedoring Co. v. State Tax Commission,* 302 U.S. 90 (1937) and *Joseph v. Carter & Weekes Stevedoring Co.,* 330 U.S. 422 (1947).

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4. There were 658,958 barrels in Respondents' jurisdiction on January 1, 1989 (App. 58a) versus 200,000 barrels at Three Rivers, Texas (App. 62a).

In the case of *R.J. Reynolds Tobacco Co. v. Durham County, North Carolina,* 479 U.S. 130 (1986), this Court went further and held that imported tobacco destined for domestic use but stored for up to two years in customs-bonded warehouses was subject to property taxation. This decision serves to clarify the *Michelin* holding with respect to imported goods which had reached their state of destination.

In upholding the property taxes in question this Court cited its earlier opinion in *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984) (*Hooven II*) to explain the change in direction undertaken in *Michelin.*

> The Court has stated that its decision in *Michelin Tire Corp. v. Wages,* "adopted a fundamentally different approach to cases claiming the protection of the Import-Export Clause." (Cites omitted)
>
> We explained this approach, and its distinction from the earlier analysis, in *Limbach:*
>
> *To repeat: we think it clear that this Court in Michelin specifically abandoned the concept that the Import-Export Clause constituted a broad prohibition against all forms of state taxation that fell on imports. Michelin* changed the focus of Import-Export Clause cases from the nature of the goods as imports to the nature of the tax at issue. *The new focus is not on whether the goods have lost their status as imports but is, instead, on whether the tax sought to be imposed is an "Impost or Duty."* [at 153 (Emphasis added)].

This Court then proceeded to make five points in favor of the tax. *First,* the North Carolina tax did not "interfere with the Federal Government's regulation of foreign commerce, for, as we have seen, it falls on imported and domestic goods alike and does not single out imported goods for unfavorable treatment." (at 153). The same is true in the instant cause. *Second,* the tax did not impede the collection of customs duties (at 151). The same is true in the instant cause. *Third,* "the property tax is nothing more than a means by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth." (at 154). The same is true in the instant cause. *Fourth,* "if imposition of tax happens to have the incidental effect of discouraging some importation of foreign goods, prohibiting this result is not a function of the Import-Export Clause." *Fifth* and, "finally, in light of the services provided in exchange for this tax, it hardly constitutes the kind of exaction by the seaboard States on goods destined for inland States that the Framers sought to prevent by the Clause. A failure to assess the tax would shift the tax burden from Reynolds and the ultimate consumers of its tobacco products to the local taxpayers of North Carolina — a result completely at odds with *Michelin.* Accordingly, we conclude that the application of the tax to Reynolds' imported tobacco does not violate the Import-Export Clause." Cites omitted (at 154).

Just as in the instant cause Petitioner seeks immunity from taxation because the property is "in transit," so did the company in *R.J. Reynolds* and the Court wasted little time in denying the claim. This Court's reasoning is as follows:

> This Court has observed that in *Michelin* it limited its holding to the imported goods " 'no longer in transit.' " *Washington Revenue Dept.,* 435 U.S., at 755, 98 S. Ct., at 1401 (quoting *Michelin,* 423 U.S., at 302, 96 S. Ct., at 548). Reynolds contends that, because goods stored

> in customs-bonded warehouses are by definition "in transit," this cause does not fall within the scope of *Michelin's* holding.[24] This reasoning, however, is unpersuasive. *The imported tobacco here, we repeat, has nothing transitory about it: it has reached its State — indeed, its county — of destination and only the payment of the customs duty, after the appropriate aging, separates it from entrance into the domestic market.*

At 154. (Footnote omitted, emphasis added).

As indicated by this Court, the property in *Reynolds* had "*reached its State . . . of destination*" and very little except time prevented it from being used for its ultimate purpose. What seemed most significant to this Court, however, was the non-discriminatory and "quid pro quo" nature of the tax in question. The fact that the property might still be, technically, in transit did not outweigh the fact that the tax in question was fairly related to the services and protections provided by the state.

Clearly, even a non-discriminatory property tax on imported goods still in transit should not stand if it is not fairly related to the services provided by the taxing entity. However, where a fair relationship exists, the "in transit" status of the property should not require immunity from taxation. To understand the different situations which would dictate opposite results one must look to the nature of property taxation itself.

In every state, the tax is levied on the basis of the value and location of property on a particular day — generally referred to as the "assessment date." Although the tax is based on the status of property on that date, it is used to pay for governmental services provided throughout the year.

Levying a tax on an isolated shipment of imported goods which are, more or less by accident, present in the state on the assessment date but destined for immediate transhipment to another state would be demanding payment of a year's worth of governmental services when in fact those services are only going to be provided for a few days or perhaps even for a few hours. It would be impossible to justify imposition of even a non-discriminatory tax under such circumstances. The services provided to the property would not be fairly related to the tax imposed. As a result of modern transportation capabilities, a single shipment might easily be present in several jurisdictions on the same day, and thus exposed to multiple taxation. Such a tax would indeed be the very type of transit fee which the Court in *Michelin* condemned.

On the other hand, in the instant cause of action the property was present within the Respondents' boundaries not by an accidental coincidence on the assessment date, but rather as part of a continuous flow of identical property owned by Petitioner. The tax, although based on the volume and value of the property present within the Respondents' jurisdiction on January 1 of the years in dispute, is payment for the services which were provided throughout the year to the same or identical properties owned by Petitioner.

The Respondents would urge that under these circumstances, even if the oil were destined for a refinery in another state, the tax in question would not be in the nature of the "transit fees" condemned by the *Michelin* Court but rather would be the "quid pro quo for benefits actually conferred" which the Court specifically endorsed. To not allow such taxation would require local taxpayers to subsidize the services used by Petitioner which the *Michelin* Court specifically condemned.

B. The Decision Below Is Consistent With The Decision Of The Fifth Circuit.

On this point the Respondents would specifically address the one case cited by Petitioner — *Louisiana Land & Exploration Company v. Pilot Petroleum Corporation,* 900 F.2d 816 (5th Cir. 1990), *cert. denied,* 498 U.S. 897 (1990). A quick reading of that case would indicate some support for Petitioner's position in this cause. After a closer reading, however, the case is easily distinguished from the instant cause.

The distinguishing factor is that the tax in question was being levied on fuel immediately destined for a foreign nation. The federal courts have been particularly sensitive to taxes, even non-discriminatory taxes, where the tax will be borne by a foreign entity. *See Japan Line Ltd. v. Los Angeles County,* 441 U.S. 434. In the instant cause there is no conceivable way that the tax in question could have any impact on this nation's relations with another nation. Goods being exported clearly stand on a different and more sensitive footing than goods which have been imported. Even the federal government is barred from laying a duty on exports. United States Constitution, Article I, § 9, cl. 5.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT UNDER THE COMMERCE CLAUSE.

What this Court accomplished in *Michelin,* though a dramatic shift with regard to the taxation of imports, was but one of a continuing series of steps toward a more rational review of state taxation as it relates to both the Import-Export Clause and Commerce Clause of the United States Constitution. Those steps began in 1891 with the Court's holding in *Pullman's Palace Car Co. v. Pennsylvania,* 141 U.S. 18 (1891).

In that case this Court moved away from the "home port" or domicile of the owner doctrine as it related to the taxation of instrumentalities of interstate commerce. Prior to *Pullman's* the vehicles, vessels, and other equipment used to transport goods in interstate commerce were taxable only at their domicile or "home port" regardless of the degree of the contact those properties may have had with other states. The Court in *Pullman's* moved to the more rational view of "apportioned" taxation between the states where the property operated to allow taxation that reasonably related to the services and protections provided the property by those states. The apportionment doctrine has since been regularly refined and restated. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949); *Braniff Airways, Inc. v. Nebraska State Board of Equalization*, 347 U.S. 590 (1954).

In the case of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977),[5] this Court held that states have the power to tax gross receipts derived from transporting goods in exclusively interstate commerce; in other words, to tax the business of interstate commerce. This decision ended decades of indecision on the part of the court about whether the states could levy a direct tax on those engaged in interstate commerce. Prior to *Complete Auto* this Court had allowed indirect taxation but not direct taxation of interstate commerce. The result was that the states were subjected to a series of cases more concerned with style than substance. *See Spector Motor Service, Inc. v. O'Conner*, 340 U.S. 602 (1951), and *Freeman v. Hewit*, 329 U.S. 249 (1946), both of which were overruled by *Complete Auto.*

Although it is the Respondents' position that no interstate commerce issues are present in this case, perhaps their position can

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5. Although *Complete Auto* is clearly the most significant decision this Court has rendered with respect to the relationship of the Commerce Clause and state taxation, it is noteworthy that it goes unmentioned in the Petition.

best be explained by responding to the arguments that the Petitioner made before the court below that the tax in question did not meet the test set forth in *Complete Auto, supra.*

That test provides that a tax will be upheld against a Commerce Clause challenge "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

Petitioner argued that there was no substantial nexus in this cause. This argument ignored the facts of this case. Petitioner is authorized to do business in Texas (App. 62a). Oil such as that involved in this cause was continuously present within the Respondents' boundaries (App. 58a). The oil was destined to be refined within Texas (App. 58a). The oil received governmental services within Respondents' boundaries (App. 59a). Finally, the oil had no contact with any other State (App. 59a). This is not a case where the tax arose as a result of purely incidental contact with Texas.

Petitioner also argued that there was no fair apportionment in the instant cause. Respondents asked the obvious question — apportionment between Texas and what other State? The apportionment test is one designed to avoid multiple taxation of the same property or activity. The idea of apportionment arose originally with respect to the taxation of instrumentalities of interstate commerce. *See Ott v. Mississippi Valley Barge Line Co., supra.* The purpose of apportionment "is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet,* 488 U.S. 252, 261 (1989). In the case of instrumentalities of commerce, taxation has been upheld where the tax is levied on a portion of the fleet's value which fairly represents its presence or use within the state. In a case such as the instant cause where the property had no contact with any other state, there was no

possibility of multiple taxation and therefore no apportionment requirement.

Petitioner also argued that the tax was not fairly related to the property's contact with the Respondents' jurisdiction. If Petitioner had wished to seriously argue that the tax was not fairly related to the services provided, it failed to bring forth sufficient evidence to carry its burden of proof. It could, for example, have attempted to show that the amounts of oil present on January 1 of each year were anomalies and that on the average it had only a few thousand barrels in Nueces County rather than hundreds of thousands. To do this Petitioner could have protested the volume or value of the oil being appraised, but it did not.

Finally, with respect to the discrimination test established by *Complete Auto,* it is clear that the property tax involved here is by its nature non-discriminatory. That is further buttressed by the stipulations between the parties (1) that if the crude oil had originated in Texas it would be subject to the tax, and (2) that Respondents attempt to appraise for taxation all other crude oil located within their boundaries on January 1 of each year (App. 62a).

Whether it is under the Commerce Clause or the Import-Export Clause that the issue arises, if the tax singles out interstate or international commerce it will be struck down. *See American Trucking Association, Inc. v. Scheiner,* 483 U.S. 266 (1987); *Maryland v. Louisiana,* 451 U.S. 724 (1981); and *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue,* 483 U.S. 231 (1987). But if the tax is fairly related to the commerce or property being taxed it will be upheld. *Complete Auto; Michelin Washington Stevedoring;* and *D.H. Holmes Co., supra;* and *Trinova Corporation v. Michigan Department of Treasury,* 498 U.S. 358 (1991).

The *Trinova* decision contains perhaps the most concise statement of the role this Court has set for itself in these cases. There the Court held as follows:

> In reviewing State taxation schemes under the Commerce Clause, we attempt "to ensure that each State taxes only its fair share of an interstate transaction" (cite omitted). We act as a defense against state taxes which, whether by design or inadvertence, either give rise to serious concerns of double taxation, or attempt to capture tax revenues that, under the theory of the tax belong of right to other jurisdictions.

At 386.

If one looks at the two-fold role this Court defined for itself in *Trinova, supra,* one finds that the Court seeks first to protect against "double taxation." That is accomplished easily enough if the taxing state taxes only the portion of the property normally present within its boundaries. That would also accomplish the Court's second goal, which is to prevent the taxing state from capturing revenues which belong to another state. In the *American Trucking* case, *supra,* this Court applied a single sovereign test when reviewing the tax in question (at 282), in effect asking if the tax could be applied in such a way that state boundaries were a neutral factor in economic decision-making by those engaged in interstate commerce. Clearly, non-discriminatory taxes would meet such a test if the taxing state only taxed that portion of the property which was normally present within its boundaries. That is exactly the formula which has long been used for taxation of instrumentalities of commerce.

To hold that goods moving in commerce are immune from taxation without regard to the facts would defeat this Court's recent

decisions in favor of having interstate and international commerce pay its way. Where such goods are continuously present and continuously receiving governmental services, taxing them does not offend the purposes of the Constitution — not taxing them does.

CONCLUSION

Respondents' position in its most basic form is that the crude oil involved in this case is subject to property taxation in Texas in return for the governmental services it receives from the various political subdivisions of this state. The oil present within Respondents' boundaries on January 1 of the years in question is but part of a continuous presence of such oil owned by Petitioner. Exemption of this oil from taxation would impose on the other taxpayers of this State the burden of paying for the governmental services provided to Petitioner's property. Neither the Commerce Clause nor the Import-Export Clause of the United States Constitution were intended by the Framers to impose such a burden on this State and its taxpayers. Those provisions were instead designed to prevent Texas or any other state from imposing taxes on interstate or international commerce which do not relate fairly to the governmental services provided to such commerce.

In the instant cause none of the evils sought to be prevented by the Framers of the United States Constitution by their inclusion of the Commerce Clause and the Import-Export Clause are present. Therefore, this State and its political subdivisions have the right and duty to require Petitioner to pay its fair share of the cost of government.

The Nueces County Appraisal District and the Appraisal Review Board of the Nueces County Appraisal District pray that the Court deny Diamond Shamrock Refining and Marketing Company's Petition for Writ of Certiorari because the case

presents no issue appropriate for the Court's review and because the decision below was not in error.

Respectfully submitted,

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OCTOBER TERM, 1994

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY,

Petitioner,

v.

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Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONER

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On Petition for Writ of Certiorari to the Supreme Court of Texas

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Petroleum Institute ("API") respectfully moves this Court for leave to file a brief *amicus curiae* in support of the petition for a writ of certiorari pursuant to Rule 37.2 of the Supreme Court Rules. Petitioner has consented to the filing of this brief *amicus curiae*, but Respondents have declined to consent.

API seeks leave to file its brief *amicus curiae* because the Texas Supreme Court decision, if left stand-

ing, may have a significant adverse impact on the petroleum industry. If this Court fails to grant certiorari, ports of entry and other state political subdivisions across this country may impose ad valorem property taxes on all crude oil that is temporarily located within their jurisdictions en route to refineries. As a result, members of the petroleum industry will likely experience a dramatic increase in the taxes they must pay. API believes that since the impact on the petroleum industry arising from the decision below may not be presented to the Court in the briefs filed by the respective parties in this case, it is essential that API be granted leave to file its *amicus curiae* brief.

Moreover, in its *amicus curiae* brief, API discusses the importance of this Court granting certiorari in light of the conflict between the Texas Supreme Court's decision in this case and the decision of the United States Court of Appeals for the Fifth Circuit in *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir. 1990), *cert. denied*, 498 U.S. 897 (1990).

STATEMENT OF INTEREST

The American Petroleum Institute represents the interests of approximately 300 member companies involved in all aspects of the oil and natural gas industry, including exploration, production, transportation, refining and marketing of petroleum products. Like the Petitioner, many API members import crude oil from foreign sources and transport such oil to refineries located across the United States. API members are greatly concerned by the potential

adverse impact to the petroleum industry arising from the Texas Supreme Court decision.

For the reasons stated above, API respectfully requests the Court to grant the motion for leave to file a brief *amicus curiae*.

Respectfully submitted,

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October 1994

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Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

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STATEMENT OF INTEREST

The statement of interest is included in the Motion for Leave to File Brief *Amicus Curiae* in Support of Petitioner.

STATEMENT OF THE CASE AND FACTS

Amicus adopts the statement of the case and facts as set forth by Petitioner.

SUMMARY OF ARGUMENT

1. This case warrants review by this Court because the decision below may encourage many ports of en-

try and other state political subdivisions across this country to impose new ad valorem property taxes on shipments of crude oil in transit through their respective jurisdictions; the resulting increase in taxes would have a significant adverse impact on the petroleum industry.

2. If this Court fails to grant certiorari, this issue is likely to be litigated in other state courts by petroleum industry members other than Petitioner, and another court, presented with this same issue, may reach a conclusion contrary to the decision below. Rather than await that inevitable conflict, this Court should grant certiorari in this case.

3. Finally, this case warrants review because the Texas Supreme Court decision in this case conflicts with the decision of the United States Court of Appeals for the Fifth Circuit in *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir. 1990), *cert. denied*, 498 U.S. 897 (1990).

ARGUMENT

I. If Left Standing, The Decision Below May Have A Significant Adverse Impact On The Petroleum Industry.

In 1992, 2.2 billion barrels of oil were imported into the United States.[1] In 1993, the number of barrels imported in this country increased to 2.4 billion barrels.[2] Members of the domestic petroleum industry,

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[1] American Petroleum Institute, *Basic Petroleum Data Book*, Vol. XIV, No. 2 (1994).

[2] Energy Information Administration, *Petroleum Supply Annual 1993* 56 (1994).

like the Petitioner, typically obtain crude oil from foreign sources, transport the oil to the United States by tankers, and off-load the oil into storage facilities at the various points of entry to await further transportation via pipelines, trucks, rail cars or barges for delivery to the refineries. The crude oil is then processed at the refineries into such products as home heating oil and gasoline. While en route to the refineries, it is common for crude oil shipments to experience temporary delays and stoppages, depending on the availability of transportation. These temporary stoppages are merely incidental to the continuous journey of crude oil from foreign sources to their ultimate destinations, the domestic refineries. In 1992 alone, 614 billion ton-miles of crude oil were transported in this country;[3] of this amount, over 50% was transported via pipelines.[4] In 1993, it is estimated that pipelines again carried over half the crude oil transported in this country.[5]

The decision below addressing the issue of whether ports of entry (and related tax jurisdictions) may impose ad valorem property taxes on goods in transit will likely severely impact the domestic petroleum industry unless reviewed. If the mere passage of oil through a port of entry or a political subdivision constitutes a taxable incidence, as the Texas Supreme Court has held, petroleum industry members may, by

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[3] 7.5 barrels of crude oil approximately equals one metric ton. *Illustrated Petroleum Reference Dictionary*, 225 (Robert D. Langenkamp ed., PennWell Books 1982) (2d ed. 1980).

[4] *Transportation In America* 59 (Eno Transportation Foundation, Inc. 12th ed. 1994).

[5] *Id.*

virtue of the large quantities of oil that are imported and transported each year, experience a dramatic increase in their annual taxes. This country's petroleum industry already bears an overwhelming tax responsibility and can ill-afford a significant increase in taxes.

The potential adverse financial impact on the domestic petroleum industry arising from a wide-spread application of the rationale of the Texas Supreme Court decision justifies that this Court grant certiorari and resolve the issue presented by this case at this time.

II. The Possible Recurrence of the Issue Presented By This Case Justifies This Court's Review.

Given the vast quantities of crude oil imported and transported across this country annually, it is reasonable to expect that, if this Court fails to grant certiorari, ports of entry and other state political subdivisions across this country will use this new source of taxation. As a consequence, the issue presented by this case will be litigated in other state courts by other petroleum industry members. It is likely that another state court, presented with this identical issue, would reach a conclusion that conflicts with the Texas Supreme Court's analysis. Rather than await that inevitable conflict, this Court should grant certiorari and resolve the issue at this time.

III. The Texas Supreme Court Decision Conflicts With The Decision of the Fifth Circuit in *Louisiana Land*.

The Texas Supreme Court decision in this case conflicts with the decision of the United States Court of Appeals for the Fifth Circuit in *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d

816 (5th Cir. 1990), *cert. denied*, 498 U.S. 897 (1990). In *Louisiana Land*, the state of Alabama assessed an excise tax on the sale of jet aviation fuel oil that had been purchased by Pilot Petroleum Corporation from Louisiana Land & Exploration Company for sale to Canadian buyers. *Id.* at 817. Pilot Petroleum Corporation challenged the Alabama tax in federal district court. *Id.* On appeal, the Fifth Circuit found the Alabama fuel tax to be "levied on the goods themselves while they are in transit" and therefore unconstitutional under the Import-Export Clause, U.S. Const., art. I, § 10, cl. 2. *Id.* at 821.

Like the Alabama excise fuel tax in *Louisiana Land*, the ad valorem property tax assessed by Respondents in this case is a direct tax on goods "in transit." Yet, the Texas Supreme Court gave minimal consideration to the Fifth Circuit's analysis in *Louisiana Land* and upheld the property tax at issue in this case. Given the striking similarity in facts between the two cases, it is important that this Court grant certiorari and resolve the conflict that exists between the Fifth Circuit and the Texas Supreme Court decisions.

CONCLUSION

For the reasons stated above and in the Petition filed by Diamond Shamrock Refining and Marketing Company, the writ of certiorari should be granted.

Respectfully submitted,

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Institute of Property Taxation, by and through its counsel of record, Edward Kliewer, III, of Foster, Lewis, Langley, Gardner & Banack, Incorporated moves the Court for permission to file a brief amicus curiae in the

above entitled case. This motion is made upon the following statements.

STATEMENT AS TO CONSENT

Petitioner Diamond Shamrock Refining and Marketing Company has consented in writing to the filing of the subject amicus brief.

Respondents Nueces County Appraisal District and the Appraisal Review Board of the Nueces County Appraisal District have declined in writing to consent to the filing of the subject amicus brief.

STATEMENT OF INTEREST OF THE INSTITUTE OF PROPERTY TAXATION

The Institute of Property Taxation ("IPT") is a not-for-profit corporation organized under the laws of the District of Columbia with offices at 3350 Peachtree Road, NE, Suite 280, Atlanta, Georgia 30326. IPT is a nationwide organization which has approximately twenty-eight hundred members. The membership includes tax representatives of many business corporations, large and small, throughout the United States; employees of independent tax consulting firms; individual tax consultants; representatives of other professional organizations; and individuals all of whom share a common interest in (1) fostering and promoting the uniform and equitable administration of property taxes and other state and local taxes (except income taxes), and (2) minimizing the costs of administration and compliance with state and local laws.

IPT pursues these purposes through the promotion of education and professionalism of its members, the exchange of information and assistance among its members, cooperation with governmental bodies and the International Association of Assessing Officers to improve state and local tax administration throughout North America, and the establishment and promotion of high standards of competence and efficiency in tax management.

To enhance the education and professionalism of its members, IPT presents annual week-long schools in real and personal property, and sales and use taxation, as well as frequent forums, symposia and conferences concerning more specific topics and interests. It administers two professional certification programs – the CMI ("Certified Member of the Institute") for property tax professionals and the CSM ("Certified Sales Tax Member") for sales tax professionals. IPT members who seek to obtain these professional designations are required to meet rigorous educational and experience requirements and successfully pass comprehensive written and oral examinations.[1]

IPT has a strong interest in the fair administration of state and local taxes and all legal developments that affect such administration. The issue in this case is one of great national significance. The principles decided in this case can affect not only ad valorem personal property

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[1] Appended hereto is a statement of the Institute's principles, purposes and its code of ethics.

taxation, but could be extended to other forms of taxation. This case and its implications and ramifications for other states and for other forms of taxation have been the topic of much discussion at recent IPT gatherings both in formal program presentations and informally among members. IPT members have expressed concern over the potential effect of this case on taxation policy in other States and as to other forms of taxation. They fear a forthcoming wave of new, onerous and unconstitutional taxes on goods in transit. IPT, therefore, has a strong interest in ensuring that, irrespective of the ultimate judgment rendered, the Court's decision is made with full appreciation of the scope and importance of this issue.

Because of the diverse positions and interests of IPT members, consensus is seldom reached among its board of directors when requests for amicus participation are received, and IPT rarely files amicus curiae briefs. In this case, however, upon careful consideration, the board unanimously authorized the filing of this brief. Moreover, in a case involving virtually the same questions concerning exported goods, the board likewise authorized the filing of a brief on behalf of IPT in the state court. By participating as amicus curiae, IPT hopes to provide meaningful assistance in the consideration of this case.

STATEMENT OF PURPOSE AND SCOPE OF AMICUS BRIEF

It is the opinion of the Institute of Property Taxation that the issue before the Court is one of substantial national importance. The Institute believes that it is well

situated to comment upon the national significance of the issue. It is therefore the desire of the Institute to undertake to briefly illustrate the importance of this case and to bring to the Court's attention certain additional authorities and argument relevant to the resolution of the case.

Therefore, the Institute of Property Taxation respectfully requests permission of the Court to submit the enclosed brief in the above-entitled case.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE INSTITUTE OF PROPERTY TAXATION FILED IN SUPPORT OF DIAMOND SHAMROCK REFINING AND MARKETING COMPANY'S PETITION FOR A WRIT OF CERTIORARI

The Institute of Property Taxation respectfully joins as Amicus Curiae in Support of Petitioner, Diamond Shamrock Refining and Marketing Company's petition for writ of certiorari to review the judgment of the Supreme Court of the State of Texas in this case.

STATEMENT OF INTEREST OF THE INSTITUTE OF PROPERTY TAXATION

The Institute of Property Taxation ("IPT") is a not-for-profit corporation organized under the laws of the District of Columbia with offices at 3350 Peachtree Road, NE, Suite 280, Atlanta, Georgia 30326. IPT is a nationwide organization which has approximately twenty-eight hundred members. The membership includes tax representatives of many business corporations, large and small, throughout the United States; employees of independent tax consulting firms; individual tax consultants; representatives of other professional organizations; and individuals all of whom share a common interest in (1) fostering and promoting the uniform and equitable administration of property taxes and other state and local taxes (except income taxes), and (2) minimizing the costs of administration and compliance with state and local laws.

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IPT has a strong interest in the fair administration of state and local taxes and all legal developments that affect such administration. The issue in this case is one of great national significance. The principles decided in this case can affect not only ad valorem personal property taxation, but could be extended to other forms of taxation. This case and its implications and ramifications for other states and for other forms of taxation have been the topic of much discussion at recent IPT gatherings both in formal program presentations and informally among members. IPT members have expressed concern over the potential effect of this case on taxation policy in other States and as to other forms of taxation. They fear a forthcoming wave of new, onerous and unconstitutional taxes on goods in transit. IPT, therefore, has a strong interest in ensuring that, irrespective of the ultimate judgment rendered, the Court's decision is made with full appreciation of the scope and importance of this issue.

Because of the diverse positions and interests of IPT members, consensus is seldom reached among its board

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of directors when requests for amicus participation are received, and IPT rarely files amicus curiae briefs. In this case, however, upon careful consideration, the board unanimously authorized the filing of this brief. Moreover, in a case involving virtually the same questions concerning exported goods, the board likewise authorized the filing of a brief on behalf of IPT in the state court. By participating as amicus curiae, IPT hopes to provide meaningful assistance in the consideration of this case.

STATEMENT AS TO SCOPE OF BRIEF AMICUS CURIAE

The issue before the Court has been ably addressed by Diamond Shamrock Refining and Marketing Company in its petition for writ of certiorari. IPT, therefore, seeks to briefly address the importance of this case and to bring to the Court's attention some additional authorities relevant to the case, focusing primarily on the Import-Export Clause concerns.

REASONS FOR GRANTING THE WRIT

Years ago this Court recognized the insistent "pressures for new governmental revenues" which present "the baffling task of tapping fresh sources of" funding. *E.g., Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 442 (1940). Those pressures are certainly no less great today. The Texas Supreme Court's exegesis in this case not only impermissibly allows taxation of Diamonds Shamrock's oil in transit but can also be expected to have the same

effect on oil of other concerns. As Diamond Shamrock pointed out, this case directly impacts taxation of the more than fifty billion dollars worth of oil imported annually, which constitutes 10% of all goods imported into the United States each year. (Pet. 7). But, it has no less impact on the other 90% of annually imported goods. While the means of transportation may differ for other goods, those goods are likewise subject to taxation at their ports of entry under the Texas Supreme Court's opinion. Exports, too, are similarly subject to taxation. Moreover, the court's holding may encourage, and be used to support, the impermissible taxation of goods in transit from state to state. Neither are these effects restricted to the taxing authorities concerned in this case. In this quest for sources of funding, other Texas political subdivisions will undoubtedly soon follow in the taxation of goods in transit. Nor is that result restricted to Texas; other states and their subdivisions, too, could institute such tax practices both with respect to property taxation and, perhaps, as to other forms of taxation. The consequent burdens, financial and administrative, have the real potential to be devastating to the national economy.

The Texas Supreme Court noted that *Michelin* "overruled earlier cases to adopt a new analytical framework, thereby creating 'a fundamentally different approach to cases claiming the protection of the Import-Export Clause.' " (App. 4a). While that observation is undoubtedly true, this Court has never indicated that *Michelin* obliterated the entirety of the Import-Export Clause jurisprudence that preceded it. Indeed, in *Michelin*, the Court overruled only one case, and the Court has never overruled the cases which held that goods in transit are not

taxable. Rather than overrule this prohibition, *Michelin* recognized it and its continued application in proper cases. Moreover, this prohibition of taxation of goods in transit vindicates the policies underlying the Import-Export Clause, recognized in *Michelin*. Further, this prohibition provides needed guidance to local governments in applying their taxing authority. The far-reaching effect of the Texas Court's decision should be circumscribed and the long-standing bright-line rule – that the states may not tax property in transit – should be applied to bring stability and certainty to this area of the law which sorely needs those qualities. These reasons warrant the continued application of this principle as an integral part of the new analytical framework of *Michelin*.

Diamond Shamrock's oil was indisputably in transit at the time it was taxed, but Respondents nevertheless imposed the tax. The Texas Supreme Court erroneously upheld the tax by disregarding this essential prohibition.

I. THE HISTORICAL IN-TRANSIT RULE IS STILL APPLICABLE.

It has long been the law, under both the Import-Export and Commerce Clauses, that "the States may not tax property in transit." *E.g., Minnesota v. Blasius*, 290 U.S. 1, 9 (1933); *see, e.g., Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65-66 (1974); *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 80, 83 (1946); *Carson Pet. Co. v. Vail*, 279 U.S. 95, 101 (1929); *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469, 476 (1926); *Champlain Realty Co. v. Town of Brattleboro*, 260 U.S. 366, 376 (1922); *General Oil*

Co. v. Crain, 209 U.S. 211, 229 (1908); *Coe v. Town of Errol*, 116 U.S. 517 (1886).

This Court in *Michelin* did not overrule any of these and other cases which held that goods actually in transit were not taxable. Indeed, none of these prior cases have been overruled. In *Michelin*, the Court overruled only one case, and overruled it only insofar as it was contrary to the Court's holding that "Georgia's assessment of a nondiscriminatory ad valorem property tax against the imported tires [which were no longer in transit] is not within the constitutional prohibition against laying 'any Imposts or Duties on Imports. . . . ' " *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 279, 301 (1976), *overruling*, *Low v. Austin*, 13 Wall. 29 (1872). The Court predicated its discussion of the Import-Export Clause analysis of *Michelin* on the distinction between goods in transit and those that were not. *Michelin*, 423 U.S. at 286.

No case since *Michelin* has challenged in this Court a tax actually on goods in transit. Nevertheless, the Court has on several occasions discussed the in-transit status of goods and has applied the principles of pre-*Michelin* cases in resolving the contentions raised. *See, e.g., Itel Containers Int'l Corp. v. Huddleston*, ___ U.S. ___, 113 S. Ct. 1095, 1106 (1993) (sales tax on proceeds of container leases, not on goods in transit, held valid); *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 154-55 (1986) ("nothing transitory about" tobacco that had reached its destination and was stored in warehouse; storage in custom-bonded warehouse did not confer "in-transit" status); *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 757 (1978); *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 436 (1979) (tax on

cargo containers – instrumentalities of commerce – not goods in transit); *Michelin*, 423 U.S. at 302 ("tires in this case were no longer in transit"). In *R.J. Reynolds*, as in *Michelin*, the Court considered in-transit contentions concerning ad valorem taxation. In both cases, the goods were not in transit and, in upholding the taxes, the Court went to considerable lengths to distinguish the facts on that basis. *R.J. Reynolds*, 479 U.S. at 154-55; *Michelin*, 423 U.S. at 302.

Because this Court has not considered a tax on goods actually in transit after *Michelin*, it has not fully discussed the effect of the in-transit status. In *Washington Stevedoring*, however, the Court cited commentaries which discussed the in-transit qualification of *Michelin*. *Washington Stevedoring*, 435 U.S. at 755 n.20. These commentaries expound the continued immunity for goods in transit which the Court described in *Michelin*. *See* W. Hellerstein, *Michelin Tire Corp. v. Wages: Enhanced State Power to Tax Imports*, 1976 S. Ct. Rev. 99, 116 (1976); Comment, *Constitutional Law - Nondiscriminatory Ad Valorem Property Tax May Be Applied to Imports*, 30 Rutgers L. Rev. 193, 202 (1976); Note, 12 Wake Forest L. Rev. 1055, 1062 (1976).

"*Michelin* teaches that nondiscriminatory ad valorem property taxes are not 'impost' or 'duties' within the meaning of the Import-Export Clause, at least when the goods sought to be taxed are not in transit." *Hellerstein*, 1976 S. Ct. Rev. at 117.

> Whether the court is saying that an exaction not otherwise an "impost" or "duty" becomes one when imposed upon goods in transit or, alternatively, that there is a "protected penumbra" of guarantees beyond the explicit terms of the

> clause that would bar such an exaction, a court must consider this issue [the in-transit issue] in examining a taxpayer's claim that a state tax is a prohibited tax on imports, if it has concluded that the levy does not discriminate against such goods. [Footnotes omitted].

Id. at 116. The standards developed under the Commerce Clause provide appropriate criteria and should be used in determining the in-transit status under the Import-Export Clause. *Id.* at 126.

Another of these commentators agreed with Professor Hellerstein's analysis noting that *Michelin* replaced the original package doctrine with a two-level analysis. Comment, 30 Rutgers L. Rev. at 202. Under that analysis, "[o]nly if the tax is nondiscriminatory *and* leveled on goods not 'in transit' will the tax be valid under *Michelin.*" (Emphasis added) *Id.* The third commentary cited in *Washington Stevedoring*, in the one paragraph devoted to the issue, noted that goods in import transit were an exception to the unequivocal holding of *Michelin* so that even a nondiscriminatory tax on such goods would violate the Import-Export Clause. Note, 12 Wake Forest L. Rev. 1055, 1062 (1976).

In sum, even after *Michelin*, just as the pre-*Michelin* cases held, property taxes on goods in transit are repugnant to the Import-Export Clause. J. Hellerstein, *State Taxation*, ¶ 5.4 at 188 (1983). *Michelin* limited the prohibition of taxes under the Import-Export Clause to the same bounds applicable under the Commerce Clause; both prohibit discriminatory taxes and taxes on goods in transit. Hellerstein, 1976 Sup. Ct. Rev. at 130; *see State Taxation*, ¶ 4.11 at 137. In other words, *Michelin* limited Import-

Export Clause immunity by vitiating the original package doctrine and made that immunity coextensive with that afforded domestic goods in interstate transit. *See* Hellerstein, 1976 Sup. Ct. Rev. at 124. The standards for determining the in-transit issue under the Commerce Clause likewise apply to that issue under the Import-Export Clause. *Id.* at 126.

II. THE HISTORICAL IN-TRANSIT RULE IS SUPPORTED BY THE IMPORT-EXPORT CLAUSE PURPOSES DISCUSSED IN *MICHELIN*.

The Texas Supreme Court incorrectly viewed and applied this Court's *Michelin* analysis and thereby erroneously denied the in-transit status of Diamond Shamrock's oil any efficacy. In that Court's view, the *Michelin* test monolithically applied to all nondiscriminatory property taxes to deny Import-Export Clause protection even to goods admittedly in transit. (App. 5a-6a). That view denies any effect to the several mentions of the in-transit status in *Michelin* and later cases. Contrary to this Texas Court's view, the distinctive status of goods in transit was purposefully referenced in *Michelin*. The in-transit status certainly has significance to both the first and third Import-Export Clause concerns. Even a nondiscriminatory ad valorem property tax on goods in transit impermissibly impacts the Federal Government's ability to speak with one voice in matters of foreign relations and disturbs the harmony among the states.

A. *Speak With One Voice.* In *Michelin*, in summarizing its analysis of the historical underpinnings of the Import-Export Clause, the Court noted that nothing in

that history "even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are no longer in import transit was the type of exaction that was regarded as objectionable by the Framers of the Constitution." *Michelin*, 423 U.S. at 286. Then, in discussing the first element of the analysis announced, this Court noted:

> It is obvious that *such* nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the Clause's prohibition. By definition, such a tax does not fall on imports as such because of their place of origin. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation. [Emphasis added]

Id. This discussion of the "speak with one voice" element which concerned "*such* nondiscriminatory property taxation," referred back to, and made the discussion referable to, such nondiscriminatory property taxation "imposed on goods that are no longer in import transit." *Id.*

A nondiscriminatory property tax on goods no longer in import transit has no impact on the Federal Government's exclusive regulation of foreign commerce, does not fall on imports as such because of their place of origin, etc. *Id.* at 286. To the contrary, such a tax on imported goods in transit does impact the Federal Government's regulation of foreign commerce. *Louisiana Land & Exploration Co. v. Pilot Pet. Corp.*, 900 F.2d 816, 821 (5th

Cir. 1990), *cert. denied*, 498 U.S. 897 (1990); *see Itel*, 113 S. Ct. at 1106; *Michelin*, 423 U.S. at 286. In *Louisiana Land*, the State of Alabama imposed an excise tax on jet fuel delivered aboard a foreign vessel bound for Canada. *Louisiana Land*, 900 F.2d at 821. The court applied the *Michelin* analysis and, noting that oil is shipped from foreign sources primarily in oceangoing tankers, held that the tax discouraged foreign parties who purchased oil from United States companies from using United States ports to transport the fuel from the United States to foreign countries. *Id.* Further, the court noted, coastal states with ports like the Port of Mobile, Alabama derived significant revenue from such a tax because they could tax large quantities of fuel that were delivered into tankers from the port. *Id.* at 821. The court further noted that the tax was not on stored inventory or a business or occupation, but, rather, the tax was levied on the goods themselves while they were in transit, and thus further relied upon *Richfield Oil*, which, the court noted, has never been overruled. *Louisiana Land*, 900 F.2d at 819, 821. The court recognized that permitting any and every state to impose a direct tax on goods in transit in the export stream would circumvent the speak with one voice element of *Michelin*. *Id.* at 821. The court held that the fuel tax was an impost upon an export within the meaning of the Import-Export Clause and, thus, held the tax unconstitutional. *Id.*

The reasoning of *Louisiana Land* applies with greater force to this case. The taxes imposed in Nueces County, Texas on Diamond Shamrock's oil were, undeniably, imposed upon the oil itself while it was in transit. (App. 57a-58a). Unlike the tax in *Louisiana Land*, which fell upon a discrete transaction or occurrence in Alabama, the sale

or handling for use of the fuel, the tax on Diamond Shamrock's oil was imposed merely upon the presence of the oil. *Id.* at 822 (Jolly J., dissenting); *see Itel*, 113 S. Ct. at 1106; *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 9 (1986) (tax imposed only on sale, a discrete transaction). Hence, in addition to the effects noted in *Louisiana Land*, the tax on Diamond Shamrock's oil gives rise to a substantial risk of multiple taxation. Unlike taxing a discrete event or occurrence, because the oil can and will be "present" in many foreign jurisdictions, it is as much subject to taxation in those jurisdictions as it is in Nueces County. By contrast with goods in transit, when goods have reached their final destination and are no longer in transit, a business purpose of the owner is being served, the goods become a part of the mass of property within that jurisdiction and taxation is proper. *See Michelin*, 423 U.S. at 302; *License Cases*, 5 How. 504, 575-76 (1847) (Taney, C.J.).

Further, by definition, a property tax on goods in transit, even one that, on its face, appears to be non-discriminatory, falls upon the goods as such because of their place of origin. *See Michelin*, 423 U.S. at 286. Goods merely passing through a taxing jurisdiction en route to their intended destination and present in that jurisdiction for no other purpose of the owner are there, and hence taxed there, because their place of origin required them to be transported through the jurisdiction. That is certainly true of Diamond Shamrock's oil in this case. Foreign shipment of oil is accomplished almost exclusively by oil tanker, that being the only practical means for such transportation. *See Louisiana Land*, 900 F.2d at 821; (Pet. at 7, 7 n.6). If Diamond Shamrock's oil had not come by tanker

from foreign sources, it would never have been in Nueces County, en route to its final destination. Nor would it have been subject to the brief stoppage caused solely by the change of the means of transportation from oceangoing tanker to pipeline. Perforce, its foreign origins necessarily resulted in the imposition of the tax on the oil concerned in this cause. Moreover, the Texas tax is inherently applied selectively to this oil which was unfortuitously in Nueces County on January 1 while in transit to the Three Rivers refinery. *See Michelin*, 423 U.S. at 286. Despite being present in Nueces County for only weeks or even days, this oil was nonetheless taxed at the full rate, on the full value of the oil, just as personal property permanently located in the state. (App. 57a-58a). A state or its subdivision cannot serve its parochial interest and burden foreign commerce by such a tax. *See Associated Indus. v. Lohman*, ___ U.S. ___, 114 S. Ct. 1815, 1822 (1994) (burden on commerce of discriminatory tax "is appropriately assessed with reference to the specific subdivision [of the state] in which applicable laws reveal differential treatment,"); *Fort Gratoit Sanitary Landfill, Inc. v. Michigan Dept. of Nat. Resources*, ___ U.S. ___, 112 S. Ct. 2019, 2024 (1992) (State or its subdivision may not avoid strictures of Commerce Clause by curtailing the flow of commerce through State or subdivision).

B. *Harmony Among The States.* The Texas tax disturbs the harmony among the states and, hence, does not meet the third concern discussed in *Michelin*. This Court noted in *Michelin* that "nondiscriminatory ad valorem property taxes do not interfere with the free flow of imported goods among the states, as did exactions by States under the Articles of Confederation *directed solely at imported*

goods." Michelin, 423 U.S. at 288. The ad valorem tax here as it is applied to Diamond Shamrock's oil is directed solely at those imported goods. This Texas ad valorem property tax is normally applied only to property that is located in the taxing jurisdiction with some permanence. *See* Tex. Tax Code Ann. § 11.01(b), (c) (Vernon 1992). Contrary to the circumstances of other personal property, Diamond Shamrock's in-transit oil is only temporarily in the Nueces County taxing jurisdictions; indeed, it is only passing through. Hence, the tax as applied here is an exaction upon imports *as imports*, not a "property tax indiscriminately applied to all owners of property." *Michelin*, 423 U.S. at 300, *citing*, *License Cases*, 5 How. at 576. In *Michelin*, this Court recognized that ad valorem property taxes are not proper under the Import-Export Clause on goods "merely *in transitu*, and on their way to the distant cities, villages, and country for which they are destined" and those goods could "in no sense be regarded as a part of that mass of property in the State usually taxed for the support of the state government." *License Cases*, 5 How. at 575; *see Michelin*, 423 U.S. 290, 290 n.10, *citing*, *License Cases*, 5 How. at 575-76. Taxes on such goods are "no more than transit fees on the privilege of moving through a state," and are precisely the type of nondiscriminatory property taxes that can be prohibited to secure the third noted purpose of the Import-Export Clause. *Michelin*, 423 U.S. at 290.

Again, with respect to this third concern, the Texas Supreme Court has interpreted *Michelin* too narrowly. (App. 6a). That court concluded that there simply was no opportunity for a disturbance of the harmony among the states because the goods were in transit within the only

state the goods ever entered. (*Id.*) This Court has consistently recognized the fallacy of this conclusion. Actions of state subdivisions are equally subject to constitutional strictures as are those of the States. *Associated Industries*, 114 S. Ct. at 1822; *see Fort Gratoit*, 112 S. Ct. at 2024. More importantly, goods in transit are not "part of that mass of property in the state usually taxed for the support of the state government." *License Cases*, 5 How. at 575.

Finally, that the tax herein is precluded under the third *Michelin* element is further evidenced by the fact that importers of goods, particularly importers of foreign crude, under the extant circumstances are deprived of the modern transportation options explicitly recognized by this Court in *Michelin* as a means to avoid taxation. *See Michelin*, 423 U.S. at 288. Those means of transportation "enable importation directly into the inland States." *Id.* As the Texas Court recognized, domestic oil can be transported by trucks or pipelines in smaller amounts on intermittent trips and, thus, avoid taxation. (App. 12a). The fact that the oil here was, as stipulated, necessarily stopped at the port of entry merely to accommodate and facilitate its transit made it no less "directly" imported than the cited means of transportation allow importation. *See id.* That pause in transit should not, and indeed does not, make the goods taxable. To uphold the tax would permit taxation of and interference with the importation of the oil despite the use of the very means of avoiding taxation specified in *Michelin*. But the Court in *Michelin* did not describe a mere tax avoidance device; this Court's observation recognized the constitutional bar of taxation of goods in transit. This constitutional infirmity can, and must, be avoided "merely by prohibiting the assessment

of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed." *Id.* at 290.

Both the first and third elements of *Michelin* are not met where the goods to be taxed are in transit. *Michelin*, 423 U.S. at 286. The distinction recognized, though not applied, in *Michelin* and other cases concerning goods in transit must be given effect in the proper case. In this case, the oil is indisputably in transit and the in-transit distinction must be given effect. *Michelin* prohibits the instant tax. *See id.*

III. APPLICATION OF THE BRIGHT-LINE IN-TRANSIT RULE IS NEEDED.

In *Michelin*, the court turned from formalistic determinations that embodied the concept that all state taxation that fell on imports was prohibited by the Import-Export Clause. *See, e.g., Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 360 (1984); *Washington Stevedoring*, 435 U.S. at 762 (Powell, J., concurring). The Court has also turned from rules that have no relationship to economic realities. *E.g., Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 279 (1977). But, nevertheless, the Court has not rejected all prior authorities and approaches for determining immunity from taxation. *See, e.g., Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S. Ct. 1904, 1912, 1914 (1992) (pre-*Complete Auto* bright-line rule applied); *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 189-90 (1983) (*Japan Line* established bright-line rule); *Michelin*, 423 U.S. at 300-301 (overruling *Low v. Austin*, but relying on *License Cases*). Bright-line rules like the prohibition of taxation of goods

in transit have a place in the jurisprudence of commerce. *See Quill*, 112 S. Ct. at 1908-09, 1914. In *Quill*, the North Dakota Supreme Court shunned a "bright-line rule" of a pre-*Complete Auto* case for a more "flexible substantive approach," concluding that subsequent developments in the law required rejection of the earlier principles. *Id.* In reversing the North Dakota Court's judgment, this Court noted: "We have never intimated a desire to reject all established 'bright-line' tests." *Id.* at 1914.

> "Undue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation."

Id.

Quill demonstrates that all bright-line tests have not been supplanted by flexible substantive approaches. *Id.* Some formal demarcation of a discrete realm of commerce that must be free from state taxation is both permissible and warranted. This is certainly true where the formalism is not merely a trap for unwary draftsmen. *Id.* The long-standing, bright-line demarcation asserted herein, which has never been overruled or seriously questioned, meets the *Quill* criteria and should be applied. *See id.*

The prohibition of taxation of goods in transit is warranted by the policies underpinning the Import-Export Clause and properly addresses those policies. The establishment of definite boundaries of legitimate state taxing authority is desirable and beneficial in this area of the law which has been described as a "quagmire," *id.* at

1915, and, in some respects, as being "completely indeterminate," *Itel*, 113 S. Ct. at 1107 (Scalia, J., concurring); *see id.* at 1107-08 (illustrating indeterminate nature of test by discussion of "speak with one voice" test that, applied literally, would always be satisfied), and in which there is "much room for controversy and confusion" and little precise guidance to the states. *Quill*, 112 S. Ct. at 1915. These observations are undoubtedly true and, in fact, are illustrated by this case. (App. 1a-7a). The in-transit rule should be specifically reaffirmed and applied in this case to resolve the confusion and to provide workable guidelines. The preference for such a rule is particularly warranted because less than two years before *Michelin* the Court recognized the virtue of the simplicity of such rules which meet the "highly important" need of both the shipper and the State for clear definition "to avoid all ambiguity or questions." *Kosydar*, 417 U.S. at 71.

CONCLUSION

For the foregoing reasons, and the reasons advanced by the Petitioner, which IPT wholeheartedly endorses, Amicus Curiae, the Institute of Property Taxation urges that Diamond Shamrock's petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

THE INSTITUTE OF PROPERTY TAXATION – STATEMENT OF PRINCIPLES, PURPOSES AND CODE OF ETHICS

The Institute of Property Taxation is a non-profit nationwide organization which exists to promote ethical and professional standards of conduct among its members and to administer formal educational programs related to state and local ad valorem, sales and use taxes.

The Institute has a written code of ethics and standards of professional practice, whereby each member agrees to be governed by objective and professional standards consistent with sound administration of property and state and local tax laws and the adoption of tax legislation, with due regard for the interests of society as well as those of the member company. The following are the Institute's Statements of Principles and Purposes and the Code of Ethics.

PRINCIPLES

The Institute of Property Taxation is dedicated to fostering the professionalization of its members, to promoting the uniform and equitable administration of ad valorem taxation and all other forms of state and local taxation (other than income taxation) and to minimizing the costs of administration and compliance.

PURPOSES

In furtherance of the above principles, the Institute of Property Taxation is formed for the following purposes:

1. To foster the education and professionalization of its members and to provide its membership with the information and services necessary to effectively carry out their responsibilities in ad valorem and all other forms of state and local taxation (other than income taxation).

2. To preserve and promote the use of equitable and non-discriminatory methods in taxation of business enterprises carrying on diversified activities in taxing jurisdictions.

3. To eliminate inequitable and discriminatory distortion or otherwise illegitimate methods of determining tax liabilities.

4. To collect, analyze and disseminate information with respect to existing and proposed legislation, regulations and administrative action which is pertinent to the purposes of the Institute; encourage the free discussion of such subjects; present the views of the Institute to other taxpayer organizations, governmental bodies and other interested persons; and take such other actions as are deemed appropriate to the accomplishment of its purposes.

5. To develop and operate a program for the education of its members and to promote the study of property taxation and other forms of state and local taxation (other than income taxation) by encouraging research and by conducting conferences and symposiums on tax matters.

These principles and purposes of the Institute of Property Taxation can be achieved only by the observance of the highest standards of ethical and professional conduct by its members. To insure the observance of these

high standards, the Board of Governors has adopted the following code of ethics.

CODE OF ETHICS
STANDARDS OF PROFESSIONAL CONDUCT

The Institute of Property Taxation has established this Code of Ethics and Standards of Professional Conduct to set forth ethical and professional guidelines for all IPT members in the administration of property and sales and use taxes.

Each member of IPT agrees to subscribe to this Code of Ethics and Standards of Professional Conduct and to report to the IPT Committee on Professional Ethics any unethical practices or actions by any IPT member.

1. IT IS UNETHICAL to engage in any conduct that discredits IPT, or the tax profession.

2. IT IS UNETHICAL to engage in any activity that results in a conviction of any crime that involves the tax profession.

3. IT IS UNETHICAL to operate beyond the boundaries of an agreed relationship with an employer or a client.

4. IT IS UNETHICAL to infer or imply that you represent a person or firm you do not represent, or to file any document on behalf of a taxpayer without specific authorization of the taxpayer.

5. IT IS UNETHICAL to violate the confidential nature of the employee-employer or the consultant-client relationship, except as required by law.

6. IT IS UNETHICAL to offer or accept anything of value with the intent of inducing a specific action.

7. IT IS UNETHICAL to offer or accept anything of value as a share of a fee for an assignment in which you did not participate.

8. IT IS UNETHICAL to assign, accept or perform a tax assignment that is contingent upon producing a predetermined analysis or conclusion.

9. IT IS UNETHICAL to file or proceed with any appeal in which there is known to be no basis in fact. The determination of whether a basis in fact exists must be made as soon as reasonably possible.

10. IT IS UNETHICAL in the performance of a tax assignment to issue an appraisal, analysis or opinion that fails to disclose bias or the accommodation of a personal interest.

11. IT IS UNETHICAL in the performance of a tax assignment to willfully furnish inaccurate, deceitful, or misleading information, or to willfully conceal material information.

12. IT IS UNETHICAL to prepare or use in any manner a resume or statement of professional qualifications that is misleading or false.

13. IT IS UNETHICAL in promoting a tax practice and soliciting assignments to utilize misleading or false advertising.

14. IT IS UNETHICAL in promoting a tax practice and soliciting assignments to make a direct reference to superiority over an individual competitor.

15. IT IS UNETHICAL to solicit any tax assignment by assuring a specific result or by stating a conclusion regarding that assignment without prior analysis of the facts and circumstances pertaining thereto.

16. IT IS UNETHICAL to use client listings or references without specific authorization.

17. IT IS UNETHICAL to make any solicitation implying IPT authorization, endorsement or approval of any product or service.

18. IT IS UNETHICAL in the performance of an independent fee appraisal to violate any part of the "Uniform Standards of Professional Appraisal Practice" issued by The Appraisal Foundation.

Adopted by Board of Governors, April 28, 1991.

MOTION FILED
OCT 14 1994

(5)

No. 94-466

In The

Supreme Court of the United States

October Term, 1994

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY,

Petitioner,

v.

NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTY APPRAISAL DISTRICT,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

MOTION OF GENERAL MOTORS CORPORATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF DIAMOND SHAMROCK REFINING AND MARKETING COMPANY'S PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

General Motors Corporation, by and through its counsel of record, Edward Kliewer, III, of Foster, Lewis, Langley, Gardner & Banack, Incorporated moves the Court for permission to file a brief amicus curiae in the

above entitled case. This motion is made upon the following statements.

STATEMENT AS TO CONSENT

Petitioner Diamond Shamrock Refining and Marketing Company has consented in writing to the filing of the subject amicus brief.

Respondents Nueces County Appraisal District and the Appraisal Review Board of the Nueces County Appraisal District have declined in writing to consent to the filing of the subject amicus brief.

STATEMENT OF INTEREST OF GENERAL MOTORS CORPORATION

The domestic motor vehicle industry is a major factor in the economy of the United States, in terms of its output, the jobs it creates, the income it generates, and the taxes it pays. Over the last three decades, spending on new vehicles has averaged 4.4 percent of the United States Gross Domestic Product. Collectively, the members of the American Automobile Manufacturers Association (AAMA) – GM, Ford and Chrysler – employ over 600,000 U.S. workers in auto-related jobs, making the motor vehicle industry the largest employer among United States manufacturing industries. Additionally, AAMA members support 900,000 jobs in the supplier industry. The sale and service of completed vehicles generates further economic activity. This includes the 18,000 dealer franchises which employ about 650,000 people who sell and service

the products of the domestic automobile industry and the more than 300,000 repair and service facilities that help to maintain the United States vehicle fleet.

General Motors Corporation has operations in fifty-three countries and worldwide employment averaging 711,000 people. Best known as a full-line vehicle manufacturer, GM had worldwide factory sales in 1993 of more than 7.8 million motor vehicles, of which approximately 4.7 million were sold in the United States. GM manufactures and sells cars and trucks worldwide under a variety of nameplates, including Chevrolet, Pontiac, Oldsmobile, Buick, Cadillac, GMC Truck, Saturn, Opel, Vauxhall, Holden, Isuzu and SAAB. In 1993, GM's market share was 33.2% of the total U.S. vehicle market and 18.2% of the worldwide vehicle market. As of December 31, 1993, there were approximately 8665 GM motor vehicle dealers in North America and approximately 9200 dealers overseas.

GM also has other substantial business interests. GM's Automotive Components Group Worldwide (ACG-W) supplies components and systems to every major automotive manufacturer. General Motors Acceptance Corporation (GMAC) and its subsidiaries provide financing and insurance products to GM customers and dealers. GM Hughes Electronics Corporation (GMHE) is a specialist in automotive electronics, commercial technologies, telecommunications and space and defense electronics. Another wholly owned GM subsidiary, Electronic Data Systems (EDS), is a world leader in applying information technologies. Electro-Motive Division is the world's second largest producer of diesel-electric locomotives, and Allison Transmission is the largest U.S. producer of heavy

duty vehicle transmissions. In total, GM's 1993 worldwide sales and revenues were $138.2 billion.

In 1993, GM paid a total of nearly $4.3 billion in taxes to U.S. and foreign taxing authorities, including $603,700,000.00 in property taxes. Customers who purchased GM products paid $1,203,600,000.00 in franchise, sales, use and other local taxes and another $3,529,400,000.00 in federal excise taxes and import duties or taxes on those products.[1]

At all times, GM has vast amounts of goods in transit both to and from foreign countries and among States in this country. At any given time, GM has in transit raw material and work-in-process to or in about half of the fifty States and finished products in all States. In Texas alone, GM currently pays about two million dollars per year in ad valorem personal property taxes that are properly assessed on GM goods. If the taxation of goods in transit, allowed by the Texas Supreme Court in this case, stands that figure will increase dramatically. GM further expects increases in property taxes and other types of taxes on goods in transit in other States. These changes in taxation will result not only in the increase in costs caused by higher taxes, but also in the increase in costly administration to track and account for all goods in transit for tax purposes.

Because of its leadership in world manufacturing and the vast sums of taxes paid by it on its materials and

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[1] These represent only those taxes paid by customers that were collected by GM and remitted to the appropriate tax authorities.

products, and by its customers, GM has a vital interest in fair and equitable state and local taxation policy and administration and all legal developments that affect such taxation. The issue in this case is an important one because of its potential impact on goods moving between countries as well as between the States in this country. Moreover, GM believes that the case has implications beyond property taxation; the principles decided in this case could affect not only ad valorem personal property taxation, but could be extended to other forms of taxation. GM, therefore, has a strong interest in ensuring that this Court's decision is made with full appreciation of the scope and importance of the issue concerned in this cause.

STATEMENT OF PURPOSE AND SCOPE OF AMICUS BRIEF

It is the opinion of General Motors Corporation that the issue before the Court is one of substantial national importance. General Motors Corporation believes that it is well situated to comment upon the national significance of the issue. It is therefore the desire of General Motors Corporation to undertake to briefly illustrate the importance of this case and to bring to the Court's attention certain additional authorities and argument relevant to the resolution of the case.

Therefore, General Motors Corporation respectfully requests permission of the Court to submit the enclosed brief in the above-entitled case.

Respectfully submitted,

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No. 94-466

In The

Supreme Court of the United States

October Term, 1994

DIAMOND SHAMROCK REFINING
AND MARKETING COMPANY,

Petitioner,

v.

NUECES COUNTY APPRAISAL DISTRICT AND
THE APPRAISAL REVIEW BOARD OF THE
NUECES COUNTY APPRAISAL DISTRICT,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Texas

BRIEF AMICUS CURIAE OF GENERAL MOTORS CORPORATION FILED IN SUPPORT OF DIAMOND SHAMROCK REFINING AND MARKETING COMPANY'S PETITION FOR WRIT OF CERTIORARI

General Motors Corporation ("GM") respectfully joins as Amicus Curiae in Support of Petitioner, Diamond Shamrock Refining and Marketing Company's petition for writ of certiorari to review the judgment of the Supreme Court of the State of Texas in this case.

STATEMENT OF INTEREST OF GENERAL MOTORS CORPORATION

The domestic motor vehicle industry is a major factor in the economy of the United States, in terms of its output, the jobs it creates, the income it generates, and the taxes it pays. Over the last three decades, spending on new vehicles has averaged 4.4 percent of the United States Gross Domestic Product. Collectively, the members of the American Automobile Manufacturers Association (AAMA) – GM, Ford and Chrysler – employ over 600,000 U.S. workers in auto-related jobs, making the motor vehicle industry the largest employer among United States manufacturing industries. Additionally, AAMA members support 900,000 jobs in the supplier industry. The sale and service of completed vehicles generates further economic activity. This includes the 18,000 dealer franchises which employ about 650,000 people who sell and service the products of the domestic automobile industry and the more than 300,000 repair and service facilities that help to maintain the United States vehicle fleet.

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At all times, GM has vast amounts of goods in transit both to and from foreign countries and among States in this country. At any given time, GM has in transit raw material and work-in-process to or in about half of the fifty States and finished products in all States. In Texas alone, GM currently pays about two million dollars per year in ad valorem personal property taxes that are properly assessed on GM goods. If the taxation of goods in transit, allowed by the Texas Supreme Court in this case, stands that figure will increase dramatically. GM further expects increases in property taxes and other types of taxes on goods in transit in other States. These changes in taxation will result not only in the increase in costs caused by higher taxes, but also in the increase in costly administration to track and account for all goods in transit for tax purposes.

Because of its leadership in world manufacturing and the vast sums of taxes paid by it on its materials and products, and by its customers, GM has a vital interest in fair and equitable state and local taxation policy and administration and all legal developments that affect such taxation. The issue in this case is an important one because of its potential impact on goods moving between countries as well as between the States in this country. Moreover, GM believes that the case has implications beyond property taxation; the principles decided in this case could affect not only ad valorem personal property taxation, but could be extended to other forms of taxation. GM, therefore, has a strong interest in ensuring that this Court's decision is made with full appreciation of the scope and importance of the issue concerned in this cause.

STATEMENT AS TO SCOPE OF BRIEF AMICUS CURIAE

The issue before the Court has been ably addressed by Petitioner, DIAMOND SHAMROCK REFINING AND MARKETING COMPANY in its petition for writ of certiorari. GM seeks to briefly address the importance of this case and to bring to the Court's attention some additional relevant authorities, focusing primarily on the Commerce Clause concerns.

REASONS FOR GRANTING WRIT

Diamond Shamrock asserts that both the Commerce Clause and the Import-Export Clause of the United States Constitution prohibit taxation by the States and their subdivisions of goods actually in transit. The Texas Supreme Court held that Diamond Shamrock's oil was in transit when the challenged tax was assessed but, nevertheless, held that the tax was not violative of either of the asserted constitutional provisions. (App. 12a). Essentially, that court held that whether goods are "in transit" is irrelevant – goods could be in transit and yet meet the *Complete Auto* test so that the tax would not be precluded. Contrary to the Texas Court's conclusion, the long-standing prohibition of taxation of goods in transit under the Commerce Clause remains applicable, and is embodied in the first and fourth prongs of the *Complete Auto* test.

I. THE TRADITIONAL IN-TRANSIT RULE REMAINS APPLICABLE.

It has long been the law under the Commerce Clause, that "the States may not tax property in transit." *E.g., Minnesota v. Blasius*, 290 U.S. 1, 9 (1933) (nondiscriminatory ad valorem personal property tax on cattle that was at rest in the State and held there at pleasure of the owner and as part of general mass of property within the state upheld); *Carson Pet. Co. v. Vail*, 279 U.S. 95, 101 (1929) ("ad valorem duties levied on all the property of the petitioner" held invalid because they interfered with interstate and foreign commerce); *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469, 476 (1926) (personal property tax on logs in transit on river invalid); *Champlain Realty Co. v. Town of Brattleboro*, 260 U.S. 366, 376 (1922); *General Oil Co. v. Crain*, 209 U.S. 211, 229 (1908); *Coe v. Town of Errol*, 116 U.S. 517 (1886).

The Texas Supreme Court found that Diamond Shamrock's oil was in transit and that it was not held in Nueces County in storage or for any business purpose of the owner. (App. 6an.2, 8a). Indeed, the binding stipulation of the parties upon which the case was tried clearly specified that, at all times, the oil was in transit from its foreign sources to the Three Rivers refinery and any stoppage in Nueces County was merely to accommodate that transportation. (App. 57a-58a). Therefore, the taxation of this oil was prohibited by the Commerce Clause. The Texas Court nevertheless upheld the tax, holding that the fact that the oil was in transit was not significant. The court reached this result by applying the "[m]odern analysis . . . governed by *Complete Auto*. . . . " (App. 7a). Both

this conclusion and the result reached, however, are erroneous.

Complete Auto did not, as the Texas Court found, render the in-transit status of goods unimportant in Commerce Clause jurisprudence. To the contrary, the Court recognized the significance of the in-transit status in *Complete Auto*. The taxpayer claimed in the court below that its in-state transportation "was but one part of an interstate movement," and the tax was unconstitutional as applied to operations in interstate commerce. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 277 (1977). The tax involved in the case, however, was a "sales tax" assessed "on sales of transportation services." *Id.* at 275, 277. In other words, the tax was on a discrete transaction rather than on goods themselves that were actually in transit. The Court found that the taxpayer's attack was based solely on cases that held "that a state tax on the 'privilege of doing business' is *per se* unconstitutional when it is applied to interstate commerce." *id.* at 278, 288-89. The Court overruled those cases because they had "no relationship to economic realities" and stood "only as a trap for the unwary draftsman." *Id.* at 279. Hence, the Court sustained the tax. *Id.* at 278, 289. While the Court announced the four-pronged *Complete Auto* test, it noted, and re-emphasized, that the taxpayer did not assert that the tax failed to meet any of the four prongs of that test. *Id.* at 277-78, 287. The Court specifically noted that no claim was made that the activity was not sufficiently connected to the state to justify the tax. *Id.* at 287. The Court's holding reflects that *Complete Auto* was not an in-transit case but that in an in-transit case which properly

challenged the connection of goods in transit to the taxing entity the tax would be invalid.

No post-*Complete Auto* case has challenged a tax actually on goods in transit. Nevertheless, the Court has on several occasions considered the in-transit status of goods and has applied the principles of the previous cases in resolving the contentions raised. *See, e.g., Itel Containers Int'l Corp. v. Huddleston*, ___ U.S. ___, 113 S. Ct. 1095, 1106 (1993); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30-38 (1988); *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 748-51 (1978); *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 436 (1979); *cf. Michelin Tire Corp. v. Wages*, 423 U.S. 276, 302 (1976). *Japan Line* is the only case in which an ad valorem property tax was considered and the tax was held invalid on foreign commerce considerations. *Japan Line*, 441 U.S. at 451-54. The court did not apply, but rather assumed compliance with, the four *Complete Auto* prongs. *Id.* at 445, 451. The tax in that case was not levied on goods in transit, but rather was on instrumentalities of commerce for which the immunity from taxation is not as broad as for goods themselves. *See id.* at 444. Before discussing the *Complete Auto* test, the Court noted that pre-*Complete Auto* cases "sustained property taxes as applied to various forms of transportation equipment." *Id.* The court thus signaled that some traditional, pre-*Complete Auto* principles apply despite the advent of *Complete Auto*. *See also Washington Stevedoring*, 435 U.S. at 748-51. Moreover, this Court explicitly announced that traditional Commerce Clause analysis would invalidate even nondiscriminatory property taxes on goods in transit. *Michelin*, 423 U.S. at 290, 290n.11.

Commentators have likewise recognized that *Complete Auto* did not affect the immunity from state taxation of goods in transit. *See* J. Hellerstein, I *State Taxation*, ¶ 4.11 at 134-38 (1983); Hartman, *Federal Limitations on State and Local Taxation*, § 2:18 at 103-04, § 7.3 at 382-83 (1981); W. Hellerstein, *Michelin Tire Corp. v. Wages: Enhanced State Power to Tax Imports*, 1976 S. Ct. Rev. 99, 122, 124-26 (1976). One commentator has suggested that while direct taxes on interstate commerce do not violate the Commerce Clause, the taxation of goods in transit does because of the requirement that there be a substantial nexus between the taxing entity and the activity to be taxed. *See* J. Hellerstein, *State Taxation* ¶ 4.11 at 135-36. Another commentator, in discussing *Michelin*, noted the suitability of the standards under the Commerce Clause for resolving the in-transit issue under the Import-Export Clause and that those standards are "hardly new to the law" and remain applicable. *W. Hellerstein*, 1976 S. Ct. Rev. at 122, 124, 126.

The Texas Supreme Court erroneously asserted that the remaining validity of the "in transit" status is questionable in Commerce Clause cases, citing the *D.H. Holmes* case. (App. 10an.7). The language of *D.H. Holmes* quoted by the Texas court concerning whether the goods had come to rest merely answered the contention that the tax was improper because it was on interstate commerce itself, a contention expressly rejected in *Complete Auto*. *D.H. Holmes*, 486 U.S. at 30-31. In that case, the tax was on the *use* of goods, not on the goods themselves; hence the argument that the tax was only on the existence of the goods in the State was without merit. *Id.* at 31. Moreover, there was " 'nexus' aplenty" in that case – the taxpayer

had "13 stores and over $100,000,000 in annual sales in the State." *Id.* at 32-33. The case considered neither an ad valorem property tax nor goods in transit. Properly considering the *D.H. Holmes* case, particularly in light of the more recent and seminal *Quill* case, the Texas Court's conclusion drastically overstates the applicable law. *D.H. Holmes* in no way sanctioned a property tax on goods in transit nor indicated that there was sufficient nexus to support such a tax.

II. THE TRADITIONAL IN-TRANSIT RULE IS VINDICATED IN THE NEXUS REQUIREMENTS OF *COMPLETE AUTO*.

The Commerce Clause nexus requirement,[2] embodied in the first and fourth prongs of the *Complete Auto* test, vindicates the prohibition of taxation of goods in transit and that traditional prohibition should be retained. This nexus requirement "limit[s] the reach of State taxing authority so as to ensure that State taxation does not unduly burden interstate commerce;" it is "a means for

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[2] The requirement that the activity to be taxed have a substantial nexus with the jurisdiction that seeks to impose the tax is an integral part of Commerce Clause and, indeed, of Import-Export Clause, analysis. *See Itel*, 113 S. Ct. 1105-06; *Washington Stevedoring*, 435 U.S. at 754-55; *Japan Line*, 441 U.S. at 451n.14. Few cases, however, have actually ruled upon the contention that there was an insufficient nexus to support a tax. *E.g.*, *Trinova v. Michigan Dept. of Treasury*, 111 S. Ct. 818, 829 (1991) (no dispute regarding substantial nexus); *Goldberg v. Sweet*, 488 U.S. 252, 260 (1988) (substantial nexus agreed); *Maryland v. Louisiana*, 451 U.S. 725, 754n.27 (1981) (unnecessary to reach local nexus claim); *Japan Line*, 441 U.S. at 445 (assumed *Complete Auto* test satisfied).

limiting state burdens on interstate commerce." *Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S. Ct. 1904, 1913 (1992). The nexus requirement is grounded largely upon "concerns about the effects of state regulation on the national economy" and requires something greater than the "minimum contacts" required by the Due Process Clause. *Id.* The applicable prongs of the *Complete Auto* test require that the tax be (first) "applied to an activity with a substantial nexus to the taxing State" and (fourth) "fairly related to the services provided by the State." *Id.*; *Complete Auto*, 430 U.S. at 279. The first prong establishes a threshold test; the activity must have a substantial nexus with the taxing State before any tax may be levied. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981). The fourth prong imposes an additional limitation that "the measure of the tax must be reasonably related to the extent of the contact" since it is the local activities of the taxpayer that may properly be made to bear a "just share of state tax burden." *Id.* This prong "is to ensure that a State's tax burden is not placed upon persons who do not benefit from services provided by the State." *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989); *Commonwealth*, 453 U.S. at 625 (validity of tax rests upon whether constitutionally fair demand is exacted for aspect of interstate commerce to which tax bears special relation). "[T]he decisive issue turns on the operating incidence of the tax." *Commonwealth*, 453 U.S. at 625. "[T]he incidence of the tax as well as its measure [must be] tied to the earnings which the State . . . has made possible." *Id.* at 626; *see D.H. Holmes*, 486 U.S. at 32-33 (" 'nexus' aplenty" where catalogs distributed to improve sales in 13 stores in State). Moreover, "in the case of a tax on an activity, there

must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax." *Allied-Signal, Inc. v. Director, Div. of Taxation*, ___ U.S. ___, 112 S. Ct. 2251, 2258 (1992). "[T]he State's power to tax an individual's or corporation's activities is justified by the 'protection, opportunities and benefits' the State confers on those activities." *Id.*

Professor Jerome Hellerstein recognized that a tax on goods in transit implicates the nexus requirements of *Complete Auto*. J. Hellerstein, *State Taxation*, ¶ 4.11 at 136. He discussed the issue by reference to *Japan Line*, noting that the tax in that case was not on goods, but on instrumentalities of commerce. *Id.* He explained a simple but crucial distinction between instrumentalities and goods in transit: containers are landed in the taxing district to be loaded with goods for transport, while goods in transit are not landed for any such use to benefit the owner of the goods. *See id.* Professor Hellerstein thus recognized that the presence of goods in transit does not give rise to "earnings which the State . . . has made possible" and no protection, opportunities and benefits are conferred on that activity. *See id. See also, e.g., Allied-Signal*, 112 S. Ct. at 2258; *Commonwealth*, 453 U.S. at 625. Hence, mere presence does not provide a sufficient connection to the state in which the goods are present while in transit and the burden of a tax on such goods is unwarranted.

The Texas Court improperly upheld the tax in *Diamond Shamrock*. That Court held that there was a sufficient nexus to support a tax even if the goods were technically "in transit" because of the continuous presence of Diamond Shamrock's oil in Nueces County. (App.

12a) The court erred in so holding by equating nexus with situs for taxation.

Equating situs with nexus is erroneous because situs is a Due Process, not a Commerce Clause, concern. Unquestionably, the *Exxon* case, upon which the Texas Supreme Court relied, is a situs case which concerned Tex. Tax Code Ann. § 21.02. *Exxon Corp. v. San Patricio County*, 822 S.W.2d 269, 272 (Tex. App. – Corpus Christi 1991, writ denied). No question of foreign or even inter-state commerce was concerned in that case. *See id.* at 272. The concerns raised in such a situs case are Due Process concerns. *See id.* at 273-74, *citing, Aransas County Appraisal Review Bd. v. Texas Gulf Shrimp Co.*, 707 S.W.2d 186, 192 (Tex. App. – Corpus Christi 1986, writ ref'd n.r.e.) ("Whether property has a tax situs in a particular state is purely a due process question.").

Situs, however, does not equate with Commerce Clause nexus because the nexus requirements of Due Process and the Commerce Clauses are different and raise different issues. *Quill*, 112 S. Ct. at 1913. ("Despite the similarity in phrasing, the nexus requirement of the Due Process and Commerce clauses are not identical.") *Id.* Because of the differences in these clauses, the Court held that the tax concerned in *Quill* was not barred by the Due Process Clause, but was barred by the Commerce Clause. *Id.* at 1911, 1916.

Hence, the continuous presence analysis of *Exxon* is not applicable to the Foreign Commerce Clause question in this case. *See id.* at 1911. In holding that the Due Process Clause did not bar the tax in *Quill*, the court

noted that Due Process reasoning justified "the imposition of the collection duty on a mail-order house that is engaged in continuous and widespread solicitation of business within a State." *Id.* This continuity of activity was relevant to the Due Process determination, but not to the Commerce Clause question. *See id.* at 1910-14. As the court noted, the "minimum contacts" required by the Due Process Clause may be present while the "substantial nexus" required by the Commerce Clause is lacking. *Id.* at 1913-14. This is true because of the different constitutional concerns and policies that animate the two standards. *Id.* at 1913.

Due Process concerns "the fundamental fairness of governmental activity;" the concept addresses whether a person's connection with a state is substantial enough to legitimate the state's exercise of power over that person. *Id.* The Commerce Clause is concerned less with fairness for individual defendants than with "structural concerns about the effects of state regulation on the national economy." *Id.* The nexus requirement of the Commerce Clause serves as "a means for limiting state burdens on interstate commerce;" it is "to ensure that State taxation does not unduly burden interstate commerce." *Id.*; *see Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of National Resources*, ___ U.S. ___, 112 S. Ct. 2019, 2024 (1992) (state or subdivision cannot avoid prohibition of Commerce Clause by curtailing movement of goods through subdivision rather than state as a whole).

Illustrating a prohibited undue burden on interstate commerce in the context of the facts in *Quill*, the court noted that "[w]hat is more significant, similar obligations

might be imposed by the Nation's 6,000-plus taxing jurisdictions." *Id.* at 1913n.6, *citing, National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753, 759-60 (1967). In *Bellas Hess,* the court had sounded this warning, to which the Court alluded in *Quill*:

> For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle . . . [National Bellas Hess'] interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of the local government."
>
> *The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements.* Under the Constitution, this is a domain where Congress alone has the power of regulation and control. [Emphasis added, footnotes omitted].

Bellas Hess, 386 U.S. at 759-60.

The Texas Supreme Court's holding ensures that Diamond Shamrock's oil in foreign commerce will be subject to the very unjustifiable local entanglements from which the national economy should be free. Despite the court's apparent effort to distinguish those situations, (App. at 12a), Diamond Shamrock's oil is now taxable in every taxing jurisdiction on its route to Three Rivers. The nature of pipeline transportation requires that there be,

and the facts are that there is, a continuous flow of Diamond Shamrock's oil from Harbor Island to Three Rivers. (App. 57a-58a). Hence, there is a "year-round presence of a large quantity of Diamond Shamrock's oil at rest," (App. at 12a), in the pipeline throughout its length and in each of the taxing jurisdictions between Nueces County and Three Rivers. Under the court's holding, that oil, too, is taxable by each of the taxing jurisdictions through which the pipeline passes at the full tax rate, on the oil's full value. It does not matter that the oil in those jurisdictions is in transit because the oil in Nueces County, which the court held taxable, was in transit. It does not matter that such oil is under the control of a common carrier because the same carrier had the same control in Nueces County. Of course, those taxing authorities would argue with equal conviction, and as correctly, that they provide governmental services. The court's holding that the oil is taxable in Nueces County inexorably legitimizes the taxation of that oil in all these other jurisdictions.

This paradigm illustrates the multiple tax and administrative burdens to which Diamond Shamrock's oil would be subjected under the Texas Court's holding and, indeed, that any goods in transit that are taxed will be subjected to. It cannot be gainsaid that such taxation, with the attendant administrative requirements, does not result in unjustifiable local entanglements and is not an undue burden on foreign commerce. While the continuous presence of the oil may provide a basis for taxation under the Due Process Clause, it does not negate the undue burden on commerce and allow taxation under the Commerce Clause.

Whether these burdens are imposed only in Nueces County or in all the jurisdictions, they are nonetheless *undue* burdens, the kinds of undue burdens that the Commerce Clause nexus requirement operates to prevent. Neither the incidence nor the measure of the tax is tied to earnings which Texas made possible. *See Commonwealth*, 453 U.S. at 626. The mere presence of the oil while in transit does not provide a substantial nexus with Texas, Nueces, or any other county or taxing entity and a tax on that activity (if presence is an activity) is not authorized. *See Allied-Signal*, 112 S. Ct. at 2258. Moreover, taxation of this oil while it is merely passing through Nueces County, on the same basis as goods permanently present in the jurisdiction are taxed, results in the measure of the tax bearing no relationship to the activity in that jurisdiction. *See Commonwealth*, 453 U.S. at 629. The nexus requirements of the *Complete Auto* test proscribe the tax herein and, indeed, all taxes on goods actually in transit.

III. A BRIGHT-LINE IN-TRANSIT RULE IS NEEDED.

The Commerce Clause requires "that some aspects of trade generally must remain free from interference by the States." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981); *see, e.g., Goldberg*, 488 U.S. at 259 (*Complete Auto* placed limits on taxation of commerce). The prohibition of taxation of goods actually in transit is an age-old restraint that delimits such interference. This prohibition is completely consistent with and supported by the recent approach for analysis announced in *Complete Auto*. In that case, the court turned from erroneous formalistic determinations and those without relationship to economic

realities. *Complete Auto*, 430 U.S. at 279. But, nevertheless, the Court has not rejected all prior approaches for determining immunity. *See, e.g., Quill*, 112 S. Ct. at 1912, 1914.

In *Quill*, the North Dakota Supreme Court, shunned a "bright-line rule" of a pre-*Complete Auto* case for a more "flexible substantive approach," because subsequent developments in the law required rejection of the earlier principles. *See Quill*, 112 S. Ct. at 1908-09, 1914. In reversing the North Dakota court's judgment, this Court noted: "We have never intimated a desire to reject all established 'bright-line' tests." *Id.* at 1914. *Complete Auto* did not render "obsolete," the bright-line rule considered in *Quill* and that rule was "not inconsistent with *Complete Auto* and our recent cases." *Id.* at 1912. While the rule in *Quill*, like other bright-line tests, "appears artificial at its edges," "[t]his artificiality . . . is more than offset by the benefits of a clear rule." *Id.* at 1914, 1915. This Court thus upheld a bright-line rule which served as a "demarcation of a discrete realm of commercial activity that is free from interstate taxation". *Id.* at 1914.

All bright-line tests were not vitiated by the modern analyses and those approaches did not repudiate all of the nearly two hundred preceding years of Import-Export and Commerce Clause jurisprudence. *See id.; Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 189-90 (1983) (*Japan Line* established bright-line rule). Some formal demarcation of a discrete realm of commerce that must be free from state taxation is both permissible and warranted. This is certainly true where the formalism is not merely a trap for unwary draftsmen as was condemned in *Complete Auto*. The long-standing, bright-line rule

asserted herein, which has never been overruled or questioned, meets all the *Quill* criteria and should be applied.

The establishment of definite boundaries of legitimate state taxing authority is desirable and beneficial in this area which has been described as a "quagmire" and in which there is "much room for controversy and confusion" and little precise guidance to the states. *Quill*, 112 S. Ct. at 1915. It has been noted that the "vague and open-ended tests" of *Complete Auto* do not significantly serve "to protect reliance interests" or "to foster stability in the law." *Itel*, 113 S. Ct. at 1107 (Scalia, J., concurring). The prohibition of taxation of goods in transit should be applied in this case, and generally, to provide stability. Such a rule is particularly warranted to provide clear and simple guidance which "is highly important, both to the shipper and the State . . . so as to avoid all ambiguity or question." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 71 (1974). Moreover, such a beneficial bright-line rule is, perhaps, even more desirable here, where foreign commerce which must be afforded heightened protection is at issue, than in *Quill* where only domestic commerce was involved.

CONCLUSION

For the foregoing reasons, and the reasons stated by Petitioner, which GM wholeheartedly endorses, General Motors Corporation, as Amicus Curiae, joins Petitioner's request that the writ of certiorari in this case be granted.

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No. 94-466

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY,
Petitioner,

v.

NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTY APPRAISAL DISTRICT,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As shown in the petition, this case presents a sharply-defined issue of national importance. There can be no serious question that the decision of the Texas Supreme Court conflicts with decisions of this Court under the Import-Export Clause and the Commerce Clause as well as with the decision of the Fifth Circuit in *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir.), *cert. denied*, 498 U.S. 897 (1990).

1. Respondents do not dispute the enormous economic significance of this case. As shown in the petition (at 7-8, 18-21), and in the brief of Amicus Curiae American Petroleum Institute filed in support of the petition (at 2-3), billions of dollars of crude oil are imported into this country each year through a limited number of ports in Texas. Respondents concede — as they must — that this oil, like many other imported goods, is

often temporarily delayed at its port of entry due to transportation bottlenecks.[1] (Opp. at 4.) In addition, Respondents do not dispute that ports of entry such as Corpus Christi assess property taxes upon goods imported through them; that ports of entry can discriminate against imported goods by imposing facially neutral property taxes; or that there are few if any, political checks upon such discrimination. Finally, Respondents do not contest what the briefs of Amici Curiae American Petroleum Institute, General Motors Corporation, and Institute for Property Taxation clearly demonstrate: that state and local governments throughout the country will be encouraged to impose new taxes upon interstate and foreign commerce now that the Texas Supreme Court has approved a form of taxation hitherto assumed invalid under this Court's decisions.

2. Respondents oppose certiorari on the ground that, in their view, the decision below was correct. They primarily argue that the tax in question is consistent with the purposes of the Import-Export Clause and the Commerce Clause because no transit fees were passed along to citizens of other states. (Opp. at 11-12.) This argument is premised upon the erroneous and unsupported assumption that the oil imported into Texas was "consumed within the State." (Opp. at 12.) There is, however, no evidence in the record that the oil in question was consumed within the state. The stipulation states only that the oil was refined in Texas (App. 58a-59a), and the Texas Supreme Court's decision was premised on the fact that "[n]one of the crude oil in question was pumped or sold outside the State of Texas *in its present form.*" (App. 20a (emphasis added).) Thus, the decision below held that ports of entry may impose property taxes on raw materials in transit through them even though those materials may later be processed into finished goods and sold to consumers outside their state of entry.

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[1] Respondents also argue that domestic crude oil is subject to similar bottlenecks (Opp. at 4.), thereby implicitly agreeing with Amicus Curiae General Motors Corporation that this case presents an issue of importance to interstate as well as foreign commerce.

More fundamentally, the Import-Export Clause does not merely prohibit taxes that discriminate against out-of-state consumers; it bars "*all* Duties and Imposts" levied by states on imported goods. U.S. Const., art. I, § 10, cl.2 (emphasis added); *see Itel Containers Int'l Corp. v. Huddleston*, 113 S.Ct. 1095, 1108 (1993) (Scalia, J., concurring in part and concurring in the judgment) (noting that the prohibition on imposts and duties has a "firm basis in a constitutional text that cannot be avoided by showing that the tax on imports and exports is nondiscriminatory") (footnote omitted). As shown in the petition (at 9-11), the term "Duties" easily encompasses the tax at issue here. Respondents do not deny this, nor do they deny that a property tax assessed by a port of entry upon goods in transit through the port "is, on a substantive level, indistinguishable from an import duty." (Pet. at 10.)

3. As shown in the petition (at 10-12), the decision below conflicts with *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). Respondents do not deny that *Michelin* prohibits taxes upon imported goods in transit, nor do they dispute that *Michelin* adopted Chief Justice Taney's position that the Clause prohibits the assessment of property taxes upon goods in transit. Instead, Respondents contend that in *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130 (1986), this Court held that property taxes could be imposed upon goods "technically in transit" so long as those goods are in their state of destination. (Opp. at 13-15.) Respondents' reliance upon *Reynolds*, a case the Texas Supreme Court cited only in passing (*see* App. 2a, 5a n.1), is misplaced. The tobacco at issue in *Reynolds* was deposited in warehouses to age for up to two years, *see* 479 U.S. at 133-34, leading this Court to conclude that there was "nothing transitory" about the tobacco. *See id.* at 155. The goods here, by contrast, were not stored for any appreciable time, and it was expressly stipulated that they were in transit when they were taxed. (App. 57a-58a).

4. Respondents appear to concede that the decision below conflicts with pre-*Michelin* decisions of this Court under the Import-Export Clause. They assert that those cases are nonetheless "easily distinguished on their facts or their era."

(Opp. at 12.) Respondents do not, however, offer any of the supposedly easily made factual distinctions. Nor do they suggest that any of the cases cited in the petition have been overruled. *Cf. Itel Containers*, 113 S.Ct. at 1106 (assuming that the "prohibition on the direct taxation of imports and exports 'in transit' . . . has not been altered by the approach we adopted in *Michelin*"); *Michelin*, 423 U.S. at 279 (holding that only "insofar as *Low v. Austin*, 13 Wall. 29 (1872), is to the contrary, that decision is overruled").

5. As shown in the petition (at 13, 16-17), the decision below conflicts with this Court's decision in *Associated Industries v. Lohman*, 114 S.Ct. 1815 (1994), because it analyzes Respondents' regulation of commerce on the state rather than the county level and thereby authorizes political subdivisions of a state to regulate commerce in a manner in which the state is forbidden. This point was either lost on Respondents or they have simply chosen to ignore it. In any event, the resulting conflict merits resolution by this Court.

6. Respondents do not dispute that the decision below conflicts with the decision of the Fifth Circuit in *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, except to suggest that *Louisiana Land* may be distinguished because it involves exports rather than imports. (Opp. at 17.) This is a distinction without a difference. The Import-Export Clause does not distinguish between imports and exports: it bars "all Duties and Imposts, laid by any State on Imports or Export." U.S. Const. art. I, § 10, cl. 2. As the petition demonstrates (at 16), the lower courts in Texas have understood the decision below to apply to exports as well as imports.

7. As shown in the petition (at 16-17), the decision below also conflicts with a long line of cases under the Commerce Clause prohibiting the imposition of property taxes upon goods in transit. Although Respondents argue that the tax imposed in this case is consistent with the analytical framework adopted in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), they do not suggest that *Complete Auto* overruled or in any way rejected the cases cited by petitioner. Respondents do not even

attempt to defend the suggestion below (*see* App. 10a n.7), which the petition demonstrated to be unfounded (Pet. at 17), that this Court questioned the continuing validity of the in-transit rule in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988). Nor do Respondents deny that leading commentators still consider the in-transit rule to be the law. (*See* Pet. at 17.)

8. Resolution of the conflicts over the issue raised by this case — whether ports of entry may assess property taxes on goods in transit through them — is important to the planning and efficient operation of the import sector of the economy and to the operations of the state and local governments encompassing ports of entry and other transportation bottlenecks. The decision below presents the perfect vehicle in which to resolve this issue.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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